88-1653

No. 88-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

UNITED TRANSPORTATION UNION,

Cross-Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether an urban mass transportation authority's unilateral institution of mandatory random drug and alcohol testing of operating personnel is an unreasonable search and seizure under the Fourth and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The proceedings below involved four actions which were not consolidated into one action. The respective parties and docket numbers in the court below are:

The cross-petitioner is the United Transportation Union, which was one of the plaintiffs/cross-appellants in Nos. 88-1163 and 88-1208.

Respondents include:

1. Southeastern Pennsylvania Transportation Authority, a defendant/cross-appellee in all the cases, including Nos. 88-1160, 88-1161, 88-1162, 88-1163, 88-1206, 88-1207 and 88-1208;

2. Louis F. Gould, Jr., individually and in his official capacity as Chairman of the Board of SEPTA; Robert J. Thompson, individually and in his official capacity as Vice Chairman of the board of SEPTA; Brian W. Clymer; Judith E. Harris; Mary C. Harris; Thomas M. Hayward; Frank W. Jenkins; Richard E. Kutz; David W. Marston; James C. McHugh; and Franklin C. Wood, individually and in their official capacities as members of SEPTA's Board, as defendants/cross-appellees, in all of the cases;

3. Transport Workers' Union of Philadelphia, Local 234, plaintiff/cross-appellant, in Nos. 88-1160 and 88-1206;

4. Transport Workers' Union of America, Local 2213, plaintiff/cross-appellant, in No. 88-1161;

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT–Continued

5. Brotherhood of Locomotive Engineers, Division 71, Brotherhood of Locomotive Engineers, and Thomas C. Brennan in Nos. 88-1162 and 88-1207; and

6. Transportation Communication Union (formerly Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees), Brotherhood of Maintenance of Way Employes and Brotherhood of Railroad Signalmen in Nos. 88-1163 and 88-1208.

Cross-Petitioner is not a corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT..... ii

TABLE OF AUTHORITIES..... v

OPINIONS BELOW 2

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION IS INCONSISTENT WITH THE HOLDINGS OF THIS COURT 9

II. THIS CASE ALSO IS AN APPROPRIATE VEHICLE TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AS TO THE CONSTITUTIONALITY OF RANDOM DRUG AND ALCOHOL TESTING..... 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Camara v. Municipal Court, 387 U.S. 523 (1967) 10

Delaware v. Prouse, 440 U.S. 648 (1979) 12, 13

Div. 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1975), 429 U.S. 1029 (1976) 15

Griffin v. Wisconsin, 483 U.S. 868 (1987) 10

Horsemen's Benevolent and Protective Ass'n v. Massachusetts Racing Commission, ___ Mass. ___, 4 IER Cases 147 (Jan. 9, 1989) 15

Katz v. United States, 389 U.S. 347 (1967) 9

Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988) 15

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 12

McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) 14

National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338 (U.S. March 21, 1989) 11

New Jersey, v. T.L.O., 469 U.S. 325 (1985) 10

O'Connor v. Ortega, 480 U.S. 709 (1987) 10

Penny v. Kennedy, 846 F.2d 1563 (6th Cir. 1988) 15

Policemen's Benevolent Ass'n, Local 318 v. Township of Washington, 850 F.2d 133 (3d Cir. 1988) 14

Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) 15

Skinner v. Railway Labor Executives Ass'n, 57 U.S.L.W. 4324 (U.S. March 21, 1989) 9, 10, 11

Terry v. Ohio, 392 U.S. 1 (1968) 9, 10

TABLE OF AUTHORITIES–Continued

Page

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 10

United States v. Hansley, 469 U.S. 221 (1985) 10

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 10

United States v. Sharpe, 470 U.S. 675 (1985) 10

STATUTES:

28 U.S.C. §1254(1) 2

Railway Labor Act
45 U.S.C. §§151 *et seq*..... 3, 6
45 U.S.C. §588..... 3
45 U.S.C. §744a..... 3

No. 88-___

In The

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October Term, 1988

UNITED TRANSPORTATION UNION,

Cross-Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-PETITION

Cross-Petitioner, United Transportation Union ("UTU"), respectfully requests that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on December 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 863 F.2d 1110 (3d Cir. 1988) and is reproduced in the Appendix hereto at A1 to A30. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 678 F. Supp. 543 (E.D. Pa. 1988) and is reproduced in the Appendix at A33 to A53.

JURISDICTION

The decision of the court of appeals was entered on December 28, 1988. On January 19, 1989 and again on February 16, 1989, the court stayed the issuance of mandate, which stay continued to March 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Additionally, in filing this cross-petition, UTU relies upon Rule 19.5, and as required by Rule 21.2(e)(iii) states that the petition filed by the Southeastern Pennsylvania Transportation Authority ("SEPTA"), and the members of its Board, was received on March 10, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

> cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case calls into question the constitutionality of non-cause based random alcohol and drug tests by a mass transportation agency.

SEPTA operates bus, trolley, and commuter rail services in the five-county Philadelphia area. It began operating commuter rail service through its Regional Rail Division with its own employees on January 1, 1983, as provided in 45 U.S.C. §§ 588, 744a. SEPTA's Regional Rail Division operating employees (except locomotive engineers) are represented by the UTU in accordance with the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Local 1594 of the UTU is the representative for the bargaining unit of bus and trolley operators on SEPTA's Red Arrow Division, but is not a party to this cross-petition.

SEPTA and UTU are parties to collective bargaining agreements for the rail employees represented by UTU. These agreements do not authorize random testing. JA I, 251a, 255a-256a.[1] As has been customary, any testing prior to January 1987 was based on cause or some suspicion of impairment, possession or use. JA I, 250a, 256a.

In a news conference on January 16, 1987, SEPTA publicly announced its intent to inaugurate a random drug and alcohol procedure for its unionized employees.The unions were not consulted or informed of this program. JA I, 83a. On January 21, 1987, SEPTA issued a notice (Order No. 87-1) in which it advised its operating employees that they would be subject to urine and/or blood screening tests without advance notice. JA I, 83a; JA II, 174a-176a. Failure to provide a specimen or, in some cases, a blood sample is considered by SEPTA as an offense subjecting the employee to dismissal. JA I, 83a; JA II, 931a-933a.

On January 23, 1987, SEPTA notified eleven employees that they were required to have their urine tested pursuant to Order 87-1. JA I, 84a. Five of these individuals were members of UTU. The news media was

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[1] References to "JA" are to the Joint Appendix before the court below, and those to "App." refer to the Appendix to this Cross-Petition.

given advance notice of the testing. Followed by television cameras and news reporters, the eleven employees provided urine samples in locations near their work stations. JA I, 84a. All of these employees tested negatively. JA II, 86a.

On January 21, 1987, Local 234, Transport Workers' Union, filed a complaint alleging that SEPTA, a public entity, had violated or was about to deprive its employees of rights, privileges and immunities secured by the United States Constitution.

On January 26 and 27, 1987, the unions representing the remainder of SEPTA's unionized employees, including UTU, filed complaints which, among other things, claimed constitutional violations. JA I, 31a-57a.

The matter came before the district court on motions for a preliminary injunction. After an evidentiary hearing, the court entered an order on February 19, 1987 preliminarily enjoining SEPTA from implementing its program of random drug and alcohol testing as then constituted. JA I, 449a-460a. The trial court ordered SEPTA to prepare a revised program. *Ibid.*

On July 15, 1987, SEPTA published an Integrated Program of Education, Assistance, and Testing for Intoxicants and Controlled Substances and moved to vacate the preliminary injunction. JA III, 1079a-1115a. Styled as a final and complete document, this program continued to be revised, however, up to, during and after trial. JA III, 1116a-1162a, 1179a-1182a and 1318a-1365a.

Initially, on September 25, 1987, the trial court denied SEPTA's motion to vacate the preliminary injunction. But in orders entered on January 20, 1988 and February 22, 1988, the district court dissolved the injunction. App. A33-A55. The court approved the constitutionality of SEPTA's testing program and allowed it to be effectuated for all employees not covered by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* As to those employees covered by that Act, the program could not be placed into effect until such time as the notice and negotiation provisions of the Railway Labor Act were exhausted.[2]

The final random testing proposal approved by the district court is summarized by the courts below at pages

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[2] SEPTA has filed a petition for a writ of certiorari (No. 88-1486) which raises the issue of whether its unilateral implementation of the program was a major dispute that requires it to negotiate with the railroad brotherhoods. As the railroad unions contend in their brief in opposition to that petition, neither the district court not the court of appeals erred in application of the standard tests for the determinations under that Act. In any event, this case is not an appropriate vehicle for this Court to look at that question. For the moment, however, we note that SEPTA refused from the inception of the dispute in January 1987 until shortly before the court of appeals heard the case to negotiate on the program. Since that time, it entered into an agreement on drug and alcohol testing with the Brotherhood of Railroad Signalmen and, after the pending petition was filed, with Local 234, Transport Workers and Local 1594, UTU. *See* motion to withdraw in part filed by SEPTA on March 28, 1989. Moreover, extensive testing programs have been negotiated on other railroads with some of these brotherhoods. *See, e.g.*, "CSX, Labor Ink Drug Test Pact." Journal of Commerce, August 7, 1987, p. 1A. In sum, negotiations can produce adequate testing programs, and most of this carrier's employees are now covered by negotiated programs.

A9 to A10 and A39 to A43 of the Appendix hereto. The volume of testing is extensive. About 5,400 random breathalyzer tests will be conducted in a year, so that everyone in the pool should be tested once and possibly twice per year. JA II, 733a. Additionally, 2,600 urine tests will be taken for drug and alcohol use, with 2% retested within the same week. JA II, 733a-734a. The probabilities are that 10% will be tested twice and 2% more than twice annually. JA II, 735a.

Obviously, the cost of the program is also extensive. Start up costs for the selection process alone are estimated at $75-$100,000 with additional annual costs of $25,000. JA II, 739a. The testing itself would cost another $200,000 to $300,000 per year. JA II, 696a. Three full time drug testers would have to be employed. JA II, 735a. Total costs for the first year were estimated at between $1,000,000 and $1,500,000, and up to $2,000,000 in the second year. JA II, 696a.

The program calls for state of the art testing. There are detailed specifications for standards and controls. The program also calls for confidentiality with disclosure only on a need-to-know basis.

Under the program, employees can be selected randomly for testing at any time, apparently even when not actually on-duty or reporting for duty. Employees testing positive will be immediately removed from service. JA III, 1343a. Any retesting is at the employee's expense and only at a SEPTA approved laboratory. *Ibid.* Other than retesting, no expedited grievance procedures have been provided for challenges to positive findings. JA II, 690a. The normal grievance-arbitration procedures are slow

and take years to complete. Even where a demonstrable material error is made in testing, the employee is subject to retesting at least one time on an unannounced basis within 90 days. JA III, 1343a.

All employees testing positive will be removed from their jobs and will be discharged unless agreeing to be referred for treatment and counseling. JA III, 1344a. After successful completion of treatment, an employee will be assigned to an alternative job for up to ninety days, which job would pay about one-half of his usual employment. JA III, 1331a-1332a. During this ninety day period, they may be tested at any time. After employees are returned to their original jobs, they are subject to follow up testing on an unannounced basis for twelve months and on a scheduled basis for two more years. JA III, 1345. There are no limits on the number of tests which will be required, and any positive result will subject the employee to discharge.

Remarking that "[d]rug screening by urinalysis is, concededly, a serious infringement of an individual's reasonable expectation of privacy" (App. A47), the district court nevertheless upheld SEPTA's random program on the basis of passenger safety and the public's confidence in the system's reliability, stating (App. A46):

> Considering our present knowledge and experience, a program of frequent random testing may be the best means of assuring that SEPTA employees will not be impaired and of gaining public acceptance and support. *Shoemaker*, 795 F.2d at 1192. It may be the only way to deal with the problem of substance abuse in a highly regulated and safety critical industry affected with the public interest. *McDonell*, 809 F.2d at 1308.

The court of appeals accepted the rationale employed by the district court as to the initial justification, and said:

> The safety justification for SEPTA's drug testing policy, SEPTA's documentation of drug use problems among its workforce, the evidence of the deleterious effect of drug use, and SEPTA's showing of positive tests for drugs or alcohol by operating personnel at fault in accidents are sufficient bases for us to conclude that the random testing policy is constitutionally justified at its inception.

App. A23. The court also found that the program passed muster under the balancing test required by this Court in that it reasoned that there were, in its judgment, sufficient safeguards to protect against abuse of official discretion and the program was reasonable under the circumstances, even though "the tests are designed to uncover drug users rather than impairment." App. A23-A24.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IS INCONSISTENT WITH THE HOLDINGS OF THIS COURT.

This Court has long held that the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and evasive acts by officers of the Government or those acting at their direction." *See Skinner v. Railway Labor Executives Ass'n*, 57 *U.S.L.W.* 4324 (U.S. March 21, 1989) ("Skinner"). And as the Court stated in *Terry v. Ohio*, 392 U.S. 1, 9 (1968), "whenever an individual may harbor a reasonable 'expectation of privacy,' [*Katz v. United States*, 389 U.S. 347, 361 (1967)] (Mr.

Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion." However, the Fourth Amendment only forbids unreasonable searches and seizures. *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

Due to the nature of the right of the individual to be secure in his person, a search or seizure generally is not reasonable unless accomplished pursuant to warrant issued upon probable cause. *Skinner*, at 4328. There have been narrow exceptions to the rule, of course. Even so, the searches have been minimally intrusive, where, for example, there has been a brief stop of the individual. *E.g., United States v. Hansley*, 469 U.S. 221 (1985); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Moreover, there has been no contact with or seizure of the person of the individual. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (interrogation at border to determine residence of motorist); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (annual housing inspection).

Nevertheless, in each case, there has been some triggering mechanism or individualized suspicion to justify the search. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court upheld a carefully limited search by a police officer of the outer clothing of a person who engaged in some unusual conduct giving the appearance of criminal activity and who the officer suspects is armed and dangerous. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a report of smoking justified the suspicion that the high school student had cigarettes in the purse that the principal searched. In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), the individualized suspicion was based upon a tip to the police officer, and in *O'Connor v. Ortega*, 480 U.S. 709 (1987), by

charges of financial improprieties to the employer. Even this term in *Skinner*, the Court has relied upon accidents and human factor incidents to supply the connection permitting a warrantless search, the concept being that one or more members of a railroad operating crew involved in an accident have a reasonable chance of being impaired or a user, and, therefore, the government has a right to test them. In the companion case decided the same day as *Skinner, National Treasury Employees Union v. Von Raab*, 57 *U.S.L.W.* 4338 (U.S. March 21, 1989), the Court dispensed with the requirement of probable cause or some minimal level of individualized suspicion. However, the Court appears to permit the absence of cause or suspicion, because the persons being tested are seeking promotion. Accordingly, the employee is aware of the test requirement, the test is given once, the individual impliedly consents, and, in this setting, the individual is not likely to be frightened or annoyed.

The facts of this case cannot fit into any of those compartments. There is no reasonable cause to justify any testing of any employees of SEPTA represented by the UTU. There is no individualized suspicion of any misconduct by the employee. There is no articulated basis for testing all employees in operating positions. And there is no reason to believe that this massively intrusive mechanism with multiple testing can be justified in light of the interests the Fourth Amendment is want to serve. The only basis that SEPTA and the courts below urge as warranting this extensive policy is the special need apparently arising from the general drug and alcohol abuse problem and the unjustified depiction of transportation workers as heavy users of alcohol and drugs,

which a random testing program of this magnitude might deter.

We submit that random testing as provided for in this program cannot be justified and is constitutionally infirm. When one considers that the search here is of the person and requires his or her seizure at any time of the day or night and on or off duty (*i.e.*, subject to call) at the discretion of the government employer (and its computer), the decision below clearly conflicts with the rationale of this Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). There, the Court held that warrantless searches of an employer's business premises for the purpose of conducting an inspection for safety hazards and regulatory violations contravened the Fourth Amendment. That the inspection order sought by the Secretary of Labor was based generally as "part of an inspection program designed to assure compliance with the [Occupational Safety and Health] Act" was not considered sufficient to assure that the inspection would be constitutionally reasonable, would be authorized by statute, and would not provide unbridled discretion in field officers. *Id.*, 324 & n. 20. The program at bar suffers from the same defects. It is a wide open campaign to find something and to assure compliance with the nonuse of alcohol and of drugs, including prescribed ones, except where sanctioned by the employer's medical staff.

We further submit that the ruling below is in direct conflict with this Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979). In that case, the Court found that a random stop of a motorist in the absence of specific facts establishing a reasonable suspicion of a violation of law was constitutionally impermissible and violative of the

Fourth and Fourteenth Amendments. Stopping an automobile and detaining its occupants was found to constitute a "seizure" within the meaning of those Amendments. *Id.*, 653. Here, the individual is subject throughout the year, at any time, to report for a random test or for several of them. The employee, while subject to duty, may be called at home in the middle of the night and ordered to report for a blood and urine test. This seizure is not limited, and the detention is not the brief stop mentioned in *Delaware v. Prouse, supra*. Such action is frightening and obviously annoying. But this type of activity by employers is not a fiction, as testified to by the complaint in *Brotherhood of Locomotive Engineers and H. W. Haney v. St. Louis Southwestern Railway Co.*, Civil Action No. 88-1903-C-C (U.S. District Court for the Eastern District of Missouri) (while marked off on personal business to attend a wedding, employee ordered to report for an alcohol and drug screen). This Court said in *Delaware v. Prouse*, 440 U.S. *supra*, at 653-54:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials . . . in order " 'to safeguard the privacy and security of individuals against arbitrary invasions. . . .' "
> (Citations omitted).

That purpose is violated by the instant program. Just as the random testing in *Delaware v. Prouse*, could not pass constitutional muster, SEPTA's program cannot be justified other than by the purported exigencies of the current time, as SEPTA urges. The acceptance of this argument in the circumstances of this case would appear to eliminate

the protections of the Fourth Amendment, except in criminal cases and possibly the inspection of places.

The Court should grant certiorari in order to resolve this conflict. Because of the nature of the program and the extensive trial record, this case is well-suited to determine whether random testing is constitutionally permissible.

II. THIS CASE ALSO IS AN APPROPRIATE VEHICLE TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AS TO THE CONSTITUTIONALITY OF RANDOM DRUG AND ALCOHOL TESTING.

The Third Circuit has taken the leading position in upholding the testing of various employees without any reasonable suspicion that any of them were in fact using illegal drugs. In addition to this case, the Third Circuit has upheld random drug testing of jockeys and other horse racing employees, *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986), and also nonsuspicion mandatory urinalysis of police officers. *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988). The Eighth Circuit likewise has approved testing of prison guards with regular contact with prisoners without any reasonable suspicion that any of them were in fact using illegal drugs. *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

The Sixth Circuit, however, has refused to join these courts. Rather, it has associated itself with the "equally impressive string of citations . . . that can be made for the proposition that a mandatory urinalysis violates the fourth amendment interests of public employees when it

is carried out in the absence of reasonable individualized suspicion." *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1545 (6th Cir. 1988) (holding that mandatory drug urinalysis of firefighters without reasonable cause or suspicion violates the firefighters' rights under the Fourth Amendment to be free of unreasonable searches and seizures). The Sixth Circuit has also reached the same conclusion as to police officers. *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988). As in *Lovvorn*, that court was "not persuaded to follow the cases cited by the City of Chattanooga for the proposition that mandatory drug tests are constitutional absent individualized suspicion." *Id.*, at 1566. Even the court below recognized that a growing number of decisions have refused to accept the constitutionality of random testing. A47, at n. 14. *See also Horsemen's Benevolent and Protective Ass'n v. Massachusetts Racing Commission*, ___ Mass. ___, 4 IER Cases 147 (Jan. 9, 1989). ("Few courts have followed the *Shoemaker* decision, and then only in areas involving security and public safety"). *Id.*, 151.

In addition, the first case to consider application of the Fourth Amendment to body fluid drug and alcohol testing of public transportation employees, *Div. 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1975), *cert. denied*, 429 U.S. 1029 (1976), decided that such testing constituted a search within the meaning of the Fourth Amendment and, therefore, some suspicion or connection must exist before testing of the individual could take place.

In light of the need for guidance on this subject, the Court should grant certiorari to resolve the clear conflict

between the two groups of authorities, one finding intensive testing for special needs to be permissible under the Fourth Amendment and the other retaining, as cross-petitioners suggest is the correct view, some modicum or indicia of cause to permit the search and seizure involved.

This case is a particularly suitable vessel to consider that issue, for on SEPTA, the employees, especially on the railroad side, are subject to extensive testing even without the random program held to be constitutional. They are already subject to pre-employment testing, cause testing, suspicion testing, Federal Railroad Administration testing, accident testing, human factor incident testing, promotion testing, and in SEPTA's view, for other purposes. App. A27. The question, therefore, is: When is drug and alcohol testing enough testing for purposes of deciding that a random program on top thereof cannot pass the reasonableness test of the Fourth Amendment as made applicable to state authorities through the Fourteenth Amendment? In sum, this case involves a situation warranting this Court's attention.

CONCLUSION

For the foregoing reasons, Cross-Petitioner United Transportation Union respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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APPENDIX TO
CROSS-PETITION FOR A WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

NOS. 88-1160 and 88-1206

TRANSPORT WORKERS' UNION OF
PHILADELPHIA, LOCAL 234,
Appellant in No. 88-1206

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Appellant in No. 88-1160

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0389)

NO. 88-1161

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 2013

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
and
LOUIS F. GOULD, Jr., Esquire, Individually and in his official capacity as Chairman of the Board of SEPTA; ROBERT J. THOMPSON, Individually and in his official capacity as Vice Chairman of the Board of SEPTA; BRIAN W. CLYMER; JUDITH E. HARRIS, Esquire; MARY C. HARRIS, THOMAS M. HAYWARD, C.P.A.; FRANK W. JENKINS, Esquire; RICHARD E.

KUTZ, Esquire; DAVID W. MARSTON, Esquire; JAMES C. McHUGH and FRANKLIN C. WOOD, Individually and in their official capacities as Members of the Board of SEPTA,

Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 87-0446)

NOS. 88-1162 and 88-1207

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71 and BROTHERHOOD OF LOCOMOTIVE ENGINEERS and THOMAS C. BRENNAN,

Appellants in No. 88-1207

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY and LOUIS F. GOULD, Jr., Esquire, Individually and in his official capacity as Chairman of the Board of SEPTA; ROBERT J. THOMPSON, Individually and in his official capacity as Vice Chairman of the Board of SEPTA; BRIAN W. CLYMER; JUDITH E. HARRIS, Esquire; MARY C. HARRIS; THOMAS M. HAYWARD, C.P.A.; FRANK W. JENKINS, Esquire; RICHARD E. KUTZ, Esquire; DAVID W. MARSTON, Esquire; JAMES C. McHUGH and FRANKLIN C. WOOD, Individually and in their official capacity as Members of the Board of SEPTA,

Appellants in No. 88-1162

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0448)

NOS. 88-1163 and 88-1208

UNITED TRANSPORTATION UNION,
BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION
EMPLOYEES, BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES,
BROTHERHOOD OF
RAILROAD SIGNALMEN,
Appellants in No. 88-1208

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Appellant in No. 88-1163

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-0455)

Argued August 30, 1988

Before: SLOVITER, GREENBERG and
COWEN, *Circuit Judges*

(Opinion filed December 28, 1988)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This case presents this court for the first time with the issue of the constitutionality of random and return-to-work drug and alcohol testing of public employees holding "safety sensitive" positions within the public transportation authority serving the Philadelphia metropolitan area.[1] The district court upheld the constitutionality of the random drug testing policy, but found the addition of return-to-work testing to be unconstitutional. The court enjoined commencement of random testing of those employees covered by the Railway Labor Act, pending settlement of the dispute through the conciliation procedures specified in the Act. *Transport Workers' Union Local 234 v. Southeastern Pennsylvania Transportation Authority,* 678 F. Supp. 543 (E.D. Pa. 1988).

The Unions argue that indiscriminate use of random drug tests to ferret out illegal drug use by public employees is irreconcilable with the guarantee against unreasonable government intrusion on individual privacy of the Fourth Amendment. We do not underestimate their concern that the public clamor about the nation's drug problem creates the risk that judgments may be distorted in evaluating the constitutionality of government measures taken to curb this crisis. Nonetheless, in light of this court's precedent sustaining drug testing in other occupations and in light of the record presented in this case where the public transportation

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1. Two cases presently before the Supreme Court present facets of the issue of drug testing by public employers. *See Railway Executives Ass'n v. Burnley,* 839 F.2d 575 (9th Cir.), *cert. granted,* 108 S. Ct. 2033 (1988) (post-accident testing of railroad workers); *National Treasury Employees Union v. Von Raab,* 816 F.2d 170 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1073 (1988) (testing in conjunction with voluntary request for transfer or promotion). Neither of these cases, however, directly presents the issue of random testing raised by the appeals before us.

authority has documented a serious drug problem among its employees, to which it has traced accidents causing injury to the public, we conclude that the random drug testing at issue here is not facially invalid under the Fourth Amendment.

We also uphold the district court's finding that the transportation authority failed to justify the reasonableness of its return-to-work drug testing policy. Finally, we uphold the injunction imposed on commencement of random testing of employees covered by the Railway Labor Act.

I.

Background and Procedural History

Appellants/cross-appellees in this case ("the Unions") are the Transport Workers Union Local 234 ("TWU"), which represents approximately 5,700 of SEPTA's 6,500 employees, and five unions which represent SEPTA employees under section one of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, Sixth (1982); the Brotherhood of Locomotive Engineers, Division 71; the Brotherhood of Locomotive Engineers; the Brotherhood of Railway, Airline and Steamship Clerks; the Brotherhood of Maintenance of Way Employees; and the Brotherhood of Railroad Signalmen ("the Railway Unions").

Appellees/cross-appellants, the Southeastern Pennsylvania Transportation Authority and some of its officers and Board members (referred to collectively as "SEPTA" or "the Authority"), operate mass transportation facilities in the five-county Philadelphia metropolitan area. SEPTA is an agency of the Commonwealth of Pennsylvania, currently organized under the authority of the Pennsylvania Urban Mass Transportation Act of January 22, 1968, P.L. 42, No. 8, as amended, 55 Pa. Stat. Ann. §§600.101-600.407 (Purdon Supp. 1988). SEPTA operates subways, railroads, buses, streetcars,

and trackless trolleys, and maintains stations, depots, platforms, tracks, and other installations. In 1986, SEPTA accommodated more than 1.2 million passengers on its transit systems on an average week day.

On January 16, 1987, SEPTA publicly announced, without prior notice or consultation with the Unions, that it planned to begin administering random urinalysis tests to detect the presence of psychotropic drug metabolites and alcohol in employees' body systems. On January 21 and 26, 1987, the Unions filed complaints against SEPTA's plan in the United States District Court for the Eastern District of Pennsylvania, alleging that SEPTA's program violated their members' constitutional rights under the Fourth and Fourteenth Amendments.

The Railway Unions also alleged that SEPTA had violated section 6 of the RLA, 45 U.S.C. §156 (1982), by unilaterally instituting a random drug testing policy without serving notice and exhausting the mediation and conciliation procedures mandated by the RLA before implementation of changes in working conditions or rules under a labor contract.

In early February 1987, SEPTA posted an additional order at its offices announcing that all employees returning to work after an absence from employment of over thirty days for any reason other than vacation would be required to submit to urinalysis testing. The Unions filed amended complaints alleging that SEPTA's return-to-work testing policy also violated the constitutional rights of their members.

After four days of hearings, the district court entered a preliminary injunction enjoining SEPTA from implementing its random drug and alcohol testing program. The court expressed various concerns about, *inter alia,* the plan's failure to include reliable confirmatory testing procedures, failure to use a less intrusive breathalyzer test to detect the presence of alcohol in employees' body systems, and the lack of justification of the scope of the

job positions to be tested. It directed SEPTA to submit any further plan for random testing to it.

In July 1987, after SEPTA published the first draft of a revised drug and alcohol testing and education program which it had designed to respond to the district court's concerns, it moved to vacate the court's preliminary injunction. The case went to trial in September 1987, at which time both SEPTA and the Unions introduced extensive expert testimony about testing technology and the effects of drug use. SEPTA also presented evidence of the scope and severity of the drug problem affecting its workforce.

On September 25, 1987, the district court again delivered bench remarks criticizing various aspects of SEPTA's proposed program. SEPTA again made revisions in its proposal, and resubmitted it to the Unions and the court.

On January 19, 1988, the district court entered its final order and issued a memorandum opinion. The order dissolved the preliminary injunction against SEPTA and denied the Unions' request for a permanent injunction against the random testing component of SEPTA's drug and alcohol testing program, but granted a permanent injunction against implementation of SEPTA's return-to-work testing policy. The court also enjoined SEPTA from commencing random drug testing of workers represented by the Railway Unions, holding that unilateral implementation of such a policy gave rise to a "major dispute" within the meaning of section 6 of the RLA and thus required SEPTA to exhaust the mediation and conciliation procedures specified in that Act. Finally, the court ordered that any final revisions of SEPTA's drug and alcohol testing program be submitted for review prior to implementation, SEPTA filed a motion asking the court to amend its order to allow return-to-work testing, which the district court denied. This appeal and cross-appeal followed.

The final random testing proposal approved by the district court subjects approximately 2,600 workers to random urinalysis testing over a one-year period, and approximately 5,400 workers per year to random breathalyzer testing. Testing is limited to "operating engineers" in "safety senstive" positions.[2]

Under the breathalyzer testing program for alcohol, an employee will be considered to test positive if two successive tests yield blood alcohol levels of .04 percent or higher. Under the urinalysis test designed to detect drug metabolites, initial screening will be conducted by an EMIT immunoassay. Positive results obtained by this screening method will be subject to confirmation testing by gas chromatography/mass spectrometry (GC/MS). The parties have stipulated that this two-step procedure is reliable. Employees may also request an additional confirmatory test at their own expense if they wish.

Detailed specifications assure chain of custody and proper laboratory controls. SEPTA will not voluntarily disclose test results to law enforcement officials, and results will be kept confidential within the medical department, being disclosed only on a need-to-know

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2. Specifically, the following positions are covered:
   1) Engineer, Bus Person, Surface Train Person, Subway-Elevated Trainperson
   2) Construction Equipment Operators
   3) Superintendents of Operations, Towerpersons, Train Dispatchers, and Power Dispatchers
   4) Signal Maintainers
   5) Power Distribution Maintainers
   6) Vehicle, Mechanical, Track and Structural Inspectors
   7) Welders
   8) Sworn SEPTA police officers
   9) Any employee authorized to carry a firearm on duty
   10) Instructors and supervisors of the foregoing.

The district court disallowed classification of "Conductors and Passenger Attendants" as operating engineers unless it could be shown that these were safety sensitive positions. 678 F. Supp. at 552.

basis. Employees who are taking prescription medication must inform SEPTA's medical department of this fact. The department will make "fitness for duty" determinations with respect to these employees in consultation with the physician prescribing the medication.

Random testing is scheduled to begin ninety days after SEPTA institutes an educational campaign and thirty days after it begins to offer an Employee Assistance Program ("EAP") administered by an outside provider. All employees whose urine or breathalyzer tests produce positive results will be given a "not fit for duty" classification, removed from their jobs, and required as a condition of retaining their employment with SEPTA to enter an EAP for counseling and treatment. After successful completion of treatment, employees will be assigned to an alternative job for an observation period of up to ninety days during which they may be tested at any time. 678 F. Supp. at 547. After employees are returned to their prior positions, they are subject to follow-up tests on an unannounced basis for twelve months and on a scheduled basis for up to two years thereafter.

As an alternative to mandatory treatment following a positive test result, employees may voluntarily refer themselves to the EAP before being tested. Employees who voluntarily enter treatment will be removed from duty until completion of treatment and assigned to alternative duty for ninety days thereafter, for which they will be paid at that job's wage rate. They will be subject to unannounced follow-up testing for six months and scheduled testing for one year thereafter. Employees who voluntarily refer themselves to the EAP are given one additional chance to obtain treatment if their urine produces a positive result after treatment.

Employees who refuse to be tested, receive positive test results after treatment, or refuse to undergo treatment and counseling after a positive result will be discharged.

II.

Analysis

A.

The Legal Framework

1. *General Fourth Amendment Principles*

There is no dispute that, as a government agency, SEPTA is bound by the strictures of the Fourth Amendment. Contrary to the argument put forth by SEPTA in this appeal, it is by now well settled that government drug testing of employees constitutes a search or seizure for purposes of the Fourth Amendment. *Railway Labor Executives' Ass'n v. Burnley,* 839 F.2d 575, 580 (9th Cir.). *cert. granted,* 108 S. Ct. 2033 (1988); *Everett v. Napper,* 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones v. McKenzie,* 833 F.2d 335, 338 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 176 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1072 (1988); *McDonell v. Hunter,* 809 F.2d 1302, 1307 (8th Cir. 1987); *Shoemaker v. Handel,* 795 F.2d 1136, 1141 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986). The same principle is applicable to a compelled breathalyzer test for alcohol. *See, e.g., Burnley,* 839 F.2d at 580; *Shoemaker,* 795 F.2d at 1141-42.

The Fourth Amendment guarantees the right of the people against "unreasonable search and seizure." Except in certain carefully defined classes of cases, searches without consent or a valid search warrant are unreasonable. *O'Connor v. Ortega,* 480 U.S. 709, 720 (1987) (plurality opinion) (quoting *Mancusi v. DeForte,* 392 U.S. 364, 370 (1968)). In a certain narrow class of exceptions, however, where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable," *New Jersey v. T.L.O.,* 469 U.S. 325, 351 (1985) (Blackmun, J., concurring), a search may be reasonable even though it

is not conducted pursuant to a probable cause determination. *Id.* at 340; *see also O'Connor v. Ortega,* 480 U.S. at 725.

In such circumstances, intrusions on employees' constitutionally protected privacy interests must be evaluated by "the standard of reasonableness under all the circumstances." *Id.* at 725-26. Such an evaluation involves "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,' " *Id.* at 719 (quoting *U.S. v. Place,* 462 U.S. 696, 703 (1983)).

2. *Administrative Searches*

The Unions argue that under the constitutional equation used to determine if body fluid testing is reasonable, there must always be particularized or individualized suspicion. In essence, they argue that random testing for drugs or alcohol is never permissible under the Fourth Amendment. The difficulty with their argument is that this circuit has already rejected precisely such a contention, and we are bound to those holdings.

In two prior cases, we applied "the administrative search exception to the Fourth Amendment warrant requirement" to uphold drug testing without individualized suspicion of employees in "highly regulated industries." *Policeman's Benevolent Ass'n. Local 318 v. Township of Washington,* 850 F.2d 133, 135 (3d Cir. 1988); *Shoemaker v. Handel,* 795 F.2d 1136, 1142-43 (3d Cir.). *cert. denied,* 479 U.S. 986 (1986).

The administrative search exception has been used to permit legislatively authorized warrantless inspections of commercial property in cases in which the government interest in conducting the search would be frustrated by requiring prior notice. *See Donovan v. Dewey,* 452 U.S. 594, 598-603 (1981). Cases applying

the administrative search exception generally involve statutory schemes aimed at ensuring safety or other "substantial" government interests. *See, e.g., New York v. Burger,* 107 S.Ct. 2636, 2646-47 (1987) (upholding warrantless inspection of automobile junkyards where state had substantial interest in reducing growing problem of motor vehicle theft associated with this industry); *Donovan v. Dewey,* 452 U.S. at 603 (permitting warrantless safety inspections of mines); *United States v. Biswell,* 406 U.S. 311, 316-17 (1972) (approving warrantless searches pursuant to gun control legislation); *see also Colonnade Catering Corp. v. United States,* 397 U.S. 72, 76-77 (1970) (approving congressional scheme of warrantless searches and seizures in liquor industry in light of long history of regulation of this industry).

In *Shoemaker,* this court made a substantial leap beyond the application of the administrative search exception to commercial property by applying that exception to uphold random urine testing of jockeys mandated by the New Jersey Racing Commission under its statutory power to regulate horse racing in that state. We stated that "while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where the persons engaged in the regulated activity are the principal regulatory concern, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable." 795 F.2d at 1142. Thereafter, in *Policeman's Benevolent Association,* 850 F.2d at 141, we categorized a township's random drug testing program for police officers as an administrative search and upheld the program against a facial challenge. We explained that a drug testing program will come within the administrative search exception if it is (1) based on a strong state interest in determining whether employees are using illegal substances; and (2) directed at an industry that is

pervasively regulated in such a manner that employees' justifiable privacy expectations are diminished. *Id.* at 136.

The Unions do not argue that SEPTA's drug testing program fails to meet the first prerequisite for administrative searches since they concede that protection of the public safety is an important government interest. The Unions argue, however, that the administrative search exception is inapplicable because there is no basis for finding a diminished expectation of personal privacy from the prior government regulation of the transportation industry.

We agree that the regulations to which SEPTA points differ from those governing jockeys in New Jersey and police conduct in Washington Township. Because the police officers in *Policeman's Benevolent Association,* 850 F.2d at 138-41, were part of a "quasi-military" organization, they were subject to extensive personal regulations, including conduct rules for their private lives, a rule requiring off-duty carrying of a firearm, and the requirement of constant readiness for duty. Although the jockeys in *Shoemaker,* 795 F.2d at 1141-42, did not have the "awesome . . . power" to arrest and detain citizens that distinguishes police officers, *Policeman's Benevolent Ass'n,* 850 F.2d at 141, there is intense regulation of horse racing in New Jersey, including the licensing of all employees in the industry, which is designed to instill confidence in the integrity of the horse racing industry. This led us to reason that because the Racing Commission "historically . . . exercised its rulemaking authority in ways that have reduced the justifiable privacy expectations of persons engaged in the horse-racing industry," jockeys who accepted a state license did so with knowledge that the Commission would exercise its power to conduct warrantless searches. *Shoemaker,* 795 F.2d at 1142.

Although the enabling legislation cited by SEPTA establishes that public transportation in Pennsylvania is

a highly regulated industry, *see* 55 Pa. Stat. Ann. §§600.101 – 600.407 (Purdon Supp. 1988), SEPTA does not argue that its regulations, like those involved in our prior cases, implicated the private conduct of the workers themselves. Thus, contrary to SEPTA's argument, the regulatory scheme on which SEPTA relies is not equivalent to the extensive personal regulation involved in *Policeman's Benevolent Association* or even the lesser regulation in *Shoemaker*. Hence, the Commonwealth's regulation of the transportation industry in and of itself has not been shown to effect a comparable diminution of employees' expectations of personal privacy.[3] Therefore, the testing in this case cannot be upheld as an administrative search.

Contrary to the way the parties have read our cases, the standard for sustaining administrative searches does not represent an independent line of Fourth Amendment analysis. Our reference to administrative searches as an "exception" was as an exception to the warrant requirement. As the plurality opinion in *O'Connor v. Ortega* makes clear, although "the appropriate standard for administrative searches is not probable cause in its traditional meaning," administrative searches are merely one illustration of the application of the reasonableness standard arising out of the "careful balancing of governmental and private interests." 480 U.S. at 722-23. Thus, while we cannot uphold SEPTA's random drug and alcohol testing policy as an administrative search because of the absence of evidence of regulation

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3. SEPTA has not relied on the Federal Railroad Administration (FRA) regulations that authorize metropolitan passenger railroads to conduct post-accident, for-cause, and pre-employment drug and alcohol tests of employees, 49 C.F.R. §219.1-.505 (1987). We do not have before us the relevance, if any, of the most recent regulations of the FRA authorizing random drug testing of transportation workers, *see* 53 Fed. Reg. 47, 102 (1988) (to be codified at 49 CFR Parts 217 and 219), which were not in effect at the time of either the trial or the oral argument before us.

directed to the employees affected, we proceed to consider it under the more inclusive analysis of "reasonableness under all the circumstances" articulated by the Supreme Court in recent cases.

3. *The Balancing Test*

When justification for a warrantless search conducted without probable cause is sought on the basis of the balancing of the government interest and the individual's privacy expections, we must apply a two-part test. Courts must look, first, to whether the search was "justified at its inception," and, second, to whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *New Jersey v. T.L.O.,* 469 U.S. at 341 (quoting *Terry v. Ohio,* 392 U.S. 1, 20 (1968)).

Obviously, any erosion of the probable cause standard of the Fourth Amendment must be scrutinized with great care because the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.' " *Winston v. Lee,* 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California,* 384 U.S. 757, 767 (1966)). Individuals cannot be said to relinquish all expectations of privacy simply because they participate in spheres that are regulated by government. *See Delaware v. Prouse,* 440 U.S. 648, 663 (1979) ("[P]eople are not shorn of all Fourth Amendment protection . . . when they step from the sidewalks into their automobiles."). "The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 321 (1978).

B.

Application of the Law to this Case

We note at the outset that the constitutional issue presented for our review in this case is a narrow one. We are presently called upon to rule on the constitutionality of SEPTA's random and return-to-work drug and alcohol testing policies as described on the face of its final revised proposal; the application of these policies in practice is not before us for review at this time.[4] Our review of the district court's application of constitutional law under the Fourth Amendment is plenary.[5]

1. *The Constitutionality of SEPTA's Random Testing Program*

a. *The "Initial Justification" for Random Testing*

Even within the narrow category of cases in which the Court has found that "special needs" justify relaxing the probable cause requirement for searches, it has generally required "individualized suspicion." *See, e.g., Terry v. Ohio,* 392 U.S. 1, 21 & n. 18 (1968) (police "pat down" searches for concealed weapons do not require probable cause but do require "specific articulable facts, . . . together with rational inferences from those facts, [that] reasonably warrant that intrusion"). However, the Court has held that the suspicion prerequisite is not an "irreducible requirement" and that under certain limited circumstances, the balance of interests between the

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4. We thus do not consider the extent to which employees sanctioned as a result of positive test results retain the right to utilize the grievance and arbitration mechanisms specified under collective bargaining agreements.

5. Although the Railway Unions' brief argues that this court should hold that SEPTA's drug testing program is invalid under Pennsylvania's Constitution, this issue was apparently not presented to the district court and thus has not been preserved for appeal. Transcript of Oral Argument at 37.

government's need to conduct the search and the degree of intrusion on the individual may justify dispensing with the individualized suspicion requirement. *See, e.g., United States v. Martinez-Fuerte,* 428 U.S. 543, 561-62 (1976) (upholding constitutionality of brief vehicle stops at fixed checkpoints to question occupants without individualized suspicion).

We agree with the Unions that the intrusion on individuals' privacy caused by drug testing is more than minimal, involving an order to perform the highly private activity of urination, an order considered by some to be "offensive to personal dignity," *Patchogue-Medford Congress of Teachers v. Board of Educ.,* 70 N.Y.2d 57, 68, 517 N.Y.S.2d 456, 461, 510 N.E.2d 325, 330 (1987); *see also Capua v. City of Plainfield,* 643 F. Supp. 1507, 1511 (D.N.J. 1986).

We do not believe that this *ipso facto* renders the search unreasonable. Although in its most recent cases discussing the reasonableness standard for Fourth Amendment search purposes, the Supreme Court did not decide whether individualized suspicion is an essential element, *see O'Connor v. Ortega,* 480 U.S. at 726; *New Jersey v. T.L.O.,* 469 U.S. at 342 n.8, this court held it was not when upholding drug testing in *Shoemaker* and *Policeman's Benevolent Association* as an administrative search. For comparable reasons, we conclude that under the balancing required by the reasonableness analysis, if the state's interest is substantial enough it may override even the intrusive searches required for urinalysis. A *fortiori,* the less intrusive search by breathalyzer testing would be sustained.

Of course, the more intrusive the search, the more substantial the governmental interest that must be shown to make the requisite balance. The state interest asserted here, that of guaranteeing the safety of the public, has been accepted in other contexts as justifying drug testing without particularized suspicion. *See, e.g., Jones v. McKenzie,* 833 F.2d at 340 (routine drug testing

of bus drivers and attendants entrusted with safety of handicapped school children justified by "significant and compelling governmental interest"); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988) (individualized suspicion not required for drug testing in nuclear power industry). *Contra Burnley*, 839 F.2d at 587-88 (invalidating post-accident drug testing of railroad employees).

As stated in *O'Connor v. Ortega*, 480 U.S. at 724, "in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct . . . [to] the public interest can be severe." The government interest in protecting public safety, often of large groups of persons traveling by mass transit, is patently of a higher order than simply maintaining the "efficient and proper operation of the workplace," found sufficient by the plurality to justify limited searches of the desk and personal files of an employee in *O'Connor*. *See* 480 U.S. at 723.

We view with amazement the opening sentence in the Railway Unions' brief that "[t]his case involves an overreaction to an exaggerated hysteria conserning the use of drugs and alcohol in our society." Brief of Certain Plaintiffs-Appellants-Cross-Appellees at 1. The enormity of the problem facing this country because of drug use is sufficiently well established to justify judicial notice.

Of course, it was SEPTA's burden to show drug use by its operating employees that poses a danger to the safe operation of its vehicles. The district court made findings that drug use by SEPTA's operating employees presents a significant safety problem and that the Authority's prior suspicion-based testing program proved insufficient "to satisfy the needs of public safety." 678 F. Supp. at 549. *Compare Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1541, 1547 (6th Cir. 1988) (random drug testing of fire fighters unconstitutional where "[t]here has been no statistical or objective evidence that the performance of any member of the

department . . . has been affected by the use of drugs") *with Jones v. McKenzie,* 833 F.2d at 336 (upholding constitutionality of routine drug tests of school bus drivers and attendants following "repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty").

There is adequate support for the district court's findings. SEPTA established that in six major accidents occurring in 1986 and 1987, collectively involving at least 89 injuries to persons, the operators of vehicles at fault tested positive for alcohol or drug metabolites. App. at 1017. The operator at fault in another accident refused to submit to a test. Further, of 262 employees tested "for cause" between January 1985 and July 1987, 82 employees (thirty-one percent) tested positive for drug metabolites or alcohol. App. at 1166. Twelve percent of the "new hires" given drug tests within the same period produced positive results (116 of 1,004 tested). App. at 1165. The Unions do not argue that these are statistically insignificant figures. Instead, they argue that the presence of metabolites, particularly of marijuana metabolites, does not demonstrate present impairment and, in the case of employees "at fault," does not demonstrate causation of the accident.

Although there is no evidence of direct correlation between the presence of drug metabolites and impairment at the time of testing, users are frequently able to mask their impairment so that it is not apparent. App. at 347. Also, SEPTA produced testimony establishing that use of drugs in itself results in significant impairment. There was testimony that long after all traces of drugs have left the system, there are significant delayed and chronic impairment effects.

As Union witness Dr. John P. Morgan acknowledged, individuals whose drug use does not render them obviously impaired in performing routine work tasks can display a lack of flexibility and inability to respond to sudden changes or emergency situations. App. at 771.

The acute effects of marijuana include distortion of judgment and loss of good judgment, a decrease in alertness and caution, impairment of visual, auditory and space perception, and loss of propriety of responses, such as ability to steer. App. at 373. Cocaine ingestion typically causes aggressiveness, overreaction, and misperception. *Id.* at 378. According to SEPTA expert witness Robert J. Pandina, residual impairment effects of marijuana and cocaine include irritability, agitation, lack of alertness and awareness, and memory deficits. App. at 356. After the stimulative effects of cocaine have worn off, users' functioning becomes depressed and slower, and judgment remains impaired. App. at 378. Other delayed impairment effects occur during the period in which individuals are experiencing withdrawal from a drug on which they have become physically dependent. App. at 782, Morgan Testimony. Chronic users will experience long-term effects including a desire to increase the dose of drug taken, which will in turn increase the probability of impairment. App. at 360, Pandina Testimony.

While the Unions downplay the statistical evidence of marijuana use, a SEPTA witness testified that the impairment effects of marijuana as measured by the ability to perform certain tasks, such as simulated driving, include statistically significant effects on performance lasting for as long as twelve hours after use in some individuals. App. at 523.

In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then-current impairment could be detected, particularly in light of the testimony by experts offered by both the Unions and SEPTA that current urine testing technologies do not permit the detection or measurement of current impairment. *See* App. at 540, 548, 747, 780, 354-55.

The Unions next argue that SEPTA's program should be rejected because there are less restrictive means to deal with the drug problem of transit employees. The Court has made clear that the least restrictive means analysis applied in cases implicating the First Amendment is not applicable to cases arising under the Fourth Amendment. *Colorado v. Bertine,* 479 U.S. 367, 373-74 (1987) (quoting *Illinois v. Lafayette,* 462 U.S. 640, 647 (1983)); *Bell v. Wolfish,* 441 U.S. 520, 559 n.40 (1979) (quoting *United States v. Martinez-Fuerte,* 428 U.S. 543, 556-57 n.12 (1976)). Of course, a factor relevant to the inquiry into the reasonableness of the search at its inception would be whether less intrusive but equally effective means to the same goal are available. There has been no such showing here. In light of the district court's finding that "[m]any drugs have delayed, residual or chronic effects not ascertainable through behavioral observation," 678 F.Supp. at 550, and that SEPTA's operating employees often work in circumstances which preclude close supervision, making it infeasible to monitor performance or detect signs of drug-induced impairment by direct observation, the Unions have not shown that there is any less intrusive but equally effective means of detecting employee drug use. *Id.*

Finally, the Unions' argument that SEPTA can rely on its already existing policy of testing for drug use after accidents "chargeable" to driver fault[6] does not effectively address the public interest in detecting employees

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6. SEPTA's admitted failure to administer a drug test after every chargeable accident is disturbing but we cannot evaluate on this record the validity of its explanation that its failure to test stems from disputes with the Unions as to how an accident should be classified. Transcript of Oral Argument at 40-43. We cannot avoid noting that the district court expressed its frustration at the sorry state of labor relations among the parties to this case. *See* 678 F. Supp. at 548 n. 12.

in safety sensitive positions with drug problems *before* accidents occur.

The safety justification for SEPTA's drug testing policy, SEPTA's documentation of drug use problem among its workforce, the evidence of the deleterious effect of drug use, and SEPTA's showing of positive tests for drugs or alcohol by operating personnel at fault in accidents are sufficient bases for us to conclude that the random testing policy is constitutionally justified at its inception.

b. *The Relationship of the Search to the Need*

The Supreme Court has held that even when the search program is designed with important public safety considerations in mind, to survive the required Fourth Amendment balancing there must be sufficient safeguards to protect against abuse of official discretion in deciding whom and how to search and the search must be sufficiently productive to qualify as a reasonable law enforcement practice. *Delaware v. Prouse,* 440 U.S. 648, 655, 660, 662 (1979).

The testing policy that developed as a consequence of the district court's supervision of this case is limited to employees whose job performance implicates public safety. Even the non-operating personnel included, such as signal operators and repair persons, perform functions closely connected to the public safety and their classification as "safety sensitive" is justified.

SEPTA's random drug testing program is also reasonable with respect to the type of testing conducted. Following the district court's instructions, SEPTA substituted less intrusive testing where possible, such as breathalyzer tests to detect blood alcohol levels. Although urine testing can be used to reveal private information other than drug use, *see National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 175-76 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1072 (1988)

(testing may disclose pregnancy and certain psychological and physical illnesses), no allegation has been made that SEPTA's plan contemplates use of body fluid samples to detect such information. We are satisfied that, as described, the plan contains sufficient safeguards, in the form of confidentiality, chain of custody, verification, and random selection procedures, to protect against abuse of discretion by implementing officials. Any improper use of the personal information obtainable through SEPTA's testing program must await a challenge to the program as applied.

As noted above, one of the Unions' principal challenges to the reasonableness of SEPTA's random drug testing policy is based on their contention that the mere presence of drug metabolites in an employee's urine is not indicative of on-the-job impairment. However, as the district court explained, the expert psychologist who designed SEPTA's revised program testified that SEPTA's drug testing was aimed at detecting chronic abusers rather than on-the-job impairment. 678 F. Supp. at 548. The district court was satisfied that a sufficient nexus existed between this rationale for testing and the information gleaned through the use of urine tests. As we concluded above, since the evidence shows that chronic users present a threat to the safety of the transit system, we do not regard it as fatal that the tests are designed to uncover drug users rather than impairment.

It follows that SEPTA has satisfied the second prong of the "reasonableness under all the circumstances" standard, and that its program for random testing for drugs and alcohol satisfies the rigorous inquiry required under that standard.

2. *Return-to-Work Testing*

As we noted above, the district court found that the component of SEPTA's proposed drug testing program

which imposed body fluid testing on all employees who returned to work following absences for 30 days for any cause such as illness, on the job injury, leave of absence, reinstatement from discipline, or other absence (other than vacation), failed constitutional muster. The court found such testing was not justified at its inception because the required physical examination would identify employees who were clearly not fit for duty. *See* 678 F. Supp. at 551. Since those employees were also subject to the extensive random testing program and SEPTA had not shown that return-to-work testing was an "integral part" of a carefully considered program designed to meet a substantial need, it had failed to meet its burden to justify the need for such testing. *Id.*

Return-to-work testing must be justified either as part of a truly random testing program which does not single out a specified group or on the basis of particularized suspicion. Since the random testing which we are sustaining will include employees returning to work, SEPTA must justify its return-to-work testing on the basis of some particularized suspicion. It has, however, failed to present any evidence that the employees returning to work present some unique risk directly related to drug or alcohol use. Thus, SEPTA has not shown that this aspect of its program is initially justified or that testing of all employees returning after an absence for whatever cause has any relationship to the articulated need for the program. We will therefore not disturb the court's injunction against return-to-work testing.

III.

The RLA Injunction

SEPTA's challenge to the district court's injunction of the testing policy as applied to those employees covered by the RLA must be rejected on the basis of our recent decision in *Railway Labor Executives' Association v. Conrail,* 845 F.2d 1187 (3d Cir.), *cert. granted,*

109 S. Ct. 52 (1988). This case does not lose its status as controlling precedent because the Supreme Court has agreed to review the decision.

In *Conrail,* we held that the unilateral addition of drug testing to employee medical examinations gave rise to a "major" dispute under the RLA, entitling the parties to an injunction maintaining the status quo while they pursued the notice, mediation, and conciliation procedures mandated under sections 5 and 6 of the RLA, 45 U.S.C. §§155, 156, 845 F.2d at 1194.

A labor dispute over implementation of a drug testing program that "can 'arguably' be justified by the existing agreement," or "from habit and custom," is classifiable as a minor one and the proposed change may be implemented unilaterally. *Id.* at 1190-91 (citations omitted). In *Conrail,* we rejected the company's argument that no significant departure from past practices was involved in its addition of drug screening, which it had previously administered only "for cause," to urine tests for other substances routinely administered during periodic and return-to-work medical exams. *Id.* at 1194. We found that there were significant differences between the company's new and old practice, both because the company had switched from testing on the basis of particularized suspicion to testing without cause, and because it had substituted its previous disciplinary rule directed against employees discovered to be drug-impaired on the job with a new rule mandating discharge of employees with positive drug test results regardless of a finding of impairment. *Id.* at 1193-94.

Here, SEPTA's institution of random drug testing differs significantly from prior practice. For several decades, SEPTA's collective bargaining agreements have provided that an employee would be discharged for reporting to work under the influence of intoxicating liquors or drugs. In late 1983, SEPTA began to require urinalysis testing of workers suspected of violating this rule. When the first four employees with positive results

for marijuana metabolites were discharged, arbitrators who heard the resulting grievances reinstated the employees on the ground that the presence of marijuana metabolites in the employees' urine did not establish that they were impaired at the time of the urinalysis test.

To meet this objection, SEPTA announced in September 1985 that henceforth it would consider the presence of traces of certain intoxicants or controlled substances in the body fluids of employees on duty, reporting to duty, or off-duty but subject to duty to be a dischargeable offense *per se*. Any employee suspected of being in violation of this rule would be subject to drug testing.

In 1985, SEPTA began testing employees for drug and alcohol use on promotion or transfer to certain positions. SEPTA also began administering drug tests to employees committing "chargeable accidents," *i.e.*, accidents with respect to which the employee had been determined to be solely at fault. In July 1986, SEPTA extended this policy to require body fluid testing for any signal violation.

SEPTA argues that the Railway Unions' acquiescence, without requesting section 6 notice, in SEPTA's implementation of post-accident, suspicion-based, and transfer and promotion drug testing constitutes a waiver of their right to object to the "incremental" addition of random and return-to-work drug testing. Reply Brief of Appellees-Cross-Appellants at 11. This argument ignores the significant difference between drug testing predicated on requests for transfer or promotion, which carries an element of voluntariness, and random testing, which does not. *See National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 177 (5th Cir. 1987), *cert. granted,* 108 S. Ct. 1072 (1988) (employees tested on transfer "only as a result of a process that they choose to set in motion"). Moreover, testing on the basis of reasonable suspicion of drug use bears an element of

"cause" not present in the case of random testing. *See Division 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1267 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976) ("probable cause" exists for post-accident and suspicion-based testing). Thus, SEPTA's addition of random testing to its previous policies constitutes at least as significant a change in working conditions and rules as did the addition of drug screening to routine medical examinations in *Conrail.*

SEPTA argues that because the Unions agreed to some types of workplace testing, they waived their right to object to any drug testing policy. We reject such a rule because it would deter unions from acquiescing or compromising on the drug testing question at pain of being found to have agreed to a yet broader program. The district court found "no evidence that the unions agreed to or acquiesced in widespread testing or to any significant testing without individualized suspicion." 678 F. Supp. at 551. This finding is amply supported by the record.

SEPTA also argues that it reserved its right to modify its drug testing policies through a "management functions" clause, contained in all of its collective bargaining agreements, which provides that SEPTA retains "[a]ll management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this Agreement." App. at 1191, 1204, 1218, 1228, 1287. We agree with the court's ruling in *International Brotherhood of Teamsters v. Southwest Airlines Co.,* 842 F.2d 794, 804 (5th Cir.), *reh'g en banc granted,* 853 F.2d 283 (1988), that such broad management rights clauses cannot serve to exempt management from the RLA prohibition against unilateral institution of changes in rules and working conditions.

SEPTA's addition of broad random testing to its previous policies thus constitutes a major dispute for the purposes of the RLA, and the district court rightfully

enjoined SEPTA from implementing random testing of employees covered by the RLA pending exhaustion of the mediation and conciliation procedures required under that Act.

IV.

Conclusion

We are aware that our decision sustaining a random drug and alcohol testing program under the reasonableness standard recently enunciated by the Supreme Court can be viewed as a further erosion of government workers' important Fourth Amendment rights. We believe, however, that implicit in the balancing that underlies application of the reasonableness test is the recognition that there are some public interests that carry sufficient weight to justify even a more than minimal privacy intrusion. Public health and public safety concerns have traditionally been considered to be of the highest magnitude of public interest considerations. The effects of drugs on transit workers in safety sensitive positions as established in this record lead us to conclude that random testing by SEPTA is a reasonable response. We venture no opinion on the validity of such testing in other situations, and emphasize that our decision is confined to the case presently before us.

For the reasons set forth in more detail above, we will uphold the random drug and breathalyzer testing in SEPTA's program. We agree with the district court's conclusion that the return-to-work testing does not satisfy the first prong of the reasonableness test, since it has not been shown to be reasonable at its inception. We also have concluded that under the precedent of our *Conrail* opinion, random drug and alcohol testing cannot be unilaterally imposed on those workers covered by the RLA because that statute requires different procedures for major disputes.

We will therefore affirm the district court's order in all respects. Each party to bear its own costs.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1160/61/62/63 and 88-1206/07/08

TRANSPORT WORKERS' UNION OF
PHILADELPHIA, LOCAL 234

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 17, 1989.

/s/ DOLORES K. SLOVITER
Circuit Judge

Dated: Jan 19, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1160/61/62/63 and 88-1206/07/08

TRANSPORT WORKERS' UNION
PHILADELPHIA, LOCAL 234, *et al.*

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until March 9, 1989.

/s/ DOLORES K. SLOVITER
Circuit Judge

Dated: Feb 16, 1989

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY.

TRANSPORT WORKERS' UNION OF AMERICA LOCAL 2013

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71, et al.

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al.

UNITED TRANSPORTATION UNION, et al.

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY.

Civ. A. Nos. 87-0389, 87-0446, 87-0448 and 87-0455.

United States District Court, E.D. Pennsylvania.

Jan. 19, 1988.

Michael Brodie, Philadelphia, Pa., for Transport Workers' Union of Philadelphia, Local 234.

Jonathan K. Walters, Kirschner, Walters & Willig, Philadelphia, Pa., for Transport Workers' Union of America Local 2013.

Clinton J. Miller, III, United Transp. Union, Harold A. Ross, Ross & Kraushaar, Co., L.P.A., Cleveland, Ohio, and Cornelius C. O'Brien, III, O'Brien & Davis, Philadelphia, Pa., for United Transp. Union.

Mitchell Kraus, Broth. of Ry., Airline, and Steamship Clerks, Rockville, Md., for Broth. of Ry., Airline, and Steamship Clerks.

John F. Smith, III, Richard S. Meyer, Dilworth, Paxson, Kalish & Kauffman, Philadelphia, Pa., for Southeastern Pennsylvania Transp. Authority.

MEMORANDUM

LUDWIG, District Judge.

In these consolidated actions, upon the application of plaintiffs[1] and upon hearing, defendant Southeastern Pennsylvania Transportation Authority (SEPTA) was preliminarily enjoined, on February 9, 1987, from implementing a random drug testing program of its employees under SEPTA Order No. 87-1. Fed.R.Civ.P. 65(a). Thereafter, SEPTA modified its proposed program and moved to vacate the injunction. Additional evidentiary hearings occurred during which SEPTA made further changes in the program. The parties agreed to an adjudication for permanent injunctive relief. Fed.R. Civ.P. 65(a)(2).

The following decision is entered, and an accompanying order will be filed:

1. The preliminary injunction is now dissolved.

2. Plaintiffs' request to enjoin random testing as unconstitutional is denied, and subject to certain conditions, random testing will be permitted.

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1. Plaintiffs are six unions and the chairman of a local chapter of the Brotherhood of Locomotive Engineers. Fact Stip. ¶ 1-8.

3. So-called "return to work" testing, as proposed, will be enjoined as constitutionally unjustified.

4. As to the Railroad Brotherhood plaintiffs,[2] random testing will be enjoined because the proposal invoked a "major dispute" under Section 6 of the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.* (West 1986), and, consequently, notice, collective bargaining, and mediation are prerequisite.

I.

Transport Workers' Union of Philadelphia, Local 234 (TWU), together with its affiliated International Union, represents 5,700 of SEPTA's 6,500 employees. The balance are members of the five other plaintiff unions, under Section 151 of the Railway Labor Act, 45 U.S.C.A. § 151, Sixth. United Transportation Union, Local 1594, also represents bus and trolley operators of SEPTA's Red Arrow division under Pennsylvania's Public Employe Relations Act, 43 P.S. § 1101 *et seq.* (Purdon Supp. 1987). SEPTA is an agency and instrumentality of the Commonwealth of Pennsylvania, under a certificate of incorporation dated February 7, 1964, and is organized under the Metropolitan Transportation Act of 1965, 66 P.S. § 2001, *et seq.* (repealed) and the Pennsylvania Urban Mass Transportation Law, *as amended,* 55 P.S. § 600.101 *et seq.* (Purdon Supp. 1987).[3]

By Act of Assembly, SEPTA is empowered to own and operate transportation facilities in the Philadelphia five-county metropolitan area. Its present operations include the City Transit Division; the Suburban Transit

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2. These are the United Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Railway, Airline and Steamship Clerks, Brotherhood of Maintenance of Way Employees, and Brotherhood of Railroad Signalmen.

3. The members of SEPTA's board of directors are named as individual defendants and in their official capacities.

Division (Red Arrow-Delaware County); the Frontier Division (Montgomery County); and the Regional Railroad Division, which provides commuter rail service between the city and suburban counties. The City Transit Division operates the Broad Street and Market Street subways, the Frankford Elevated, and many bus, streetcar and trackless trolley routes in Philadelphia. SEPTA also maintains numerous stations, depots, platforms, tracks, shops and other installations. Employment terms and conditions are set forth in collective bargaining agreements with plaintiff unions.

SEPTA's operational area covers about 2,200 square miles. The City Transit Division accommodates some 798,000 passenger trips daily; the Suburban Transit Division, 66,000; the Regional Rail Division, 78,000. In 1986, more than 350 million passenger rides occurred on SEPTA vehicles. On an average weekday in 1986, the number exceeded 1.2 million. City buses and trolleys reach speeds up to 50 miles per hour; trains as high as 95 miles per hour; other high speed vehicles, 60 miles per hour. Vehicle operators must be attentive to their work. Subway and train signal systems are complex and demanding. Braking requires vigilance and sound judgment. Some special risk factors that can affect train operation are grade crossings and trespassers on rights of way. Bad weather, unruly passengers, and crowded vehicles are problems generally. A vehicle operator must have a clear mind and the ability to react quickly and efficiently. New operators must be trained. Support staff inspect and maintain essential equipment. SEPTA police carry firearms.

The unions agree that consumption of alcohol or controlled substances can render an employee unfit for work. The need to protect the safety of passengers, pedestrians, motorists, and other employees is undisputed. For over 30 years, the collective bargaining agreements between SEPTA and TWU have provided that an employee who reports to work or who becomes

under the influence of intoxicating liquor or drugs will be discharged.

On September 20, 1985 SEPTA promulgated Order No. 85-1, which called for urine or blood testing of employees suspected of being in "possession of intoxicants or controlled substances," and which described such possession as "a dischargeable offense."[4] It also issued Order No. 85-2, which permitted "a troubled employee [one with an alcohol or drug problem] to maintain an employment relationship and have . . . [a] reasonable leave of absence to obtain treatment."

In 1986, in at least three accidents, SEPTA passenger vehicle operators appeared to have been impaired by drugs or alcohol. In a train collision December 10, 1987, an engineer and a conductor were tested positive for cocaine. Tests of two conductors also were positive for marijuana. Forty-two people were injured. In a fourth accident in 1986, the operator refused testing. In 1987, three accidents also appear to have been cocaine or marijuana related as shown by post-accident testing. Between January, 1985 and July, 1987, a total of 14 percent, or nearly one seventh, of the drug and alcohol tests taken pursuant to 85-1 were positive. The problem

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4. Rule 1 in effect in the Regional Railroad Division from January 1, 1983 to October 27, 1985 stated in part:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty or their possession or use while on duty is prohibited. Employees suspected of being under the influence in violation of this rule may be required to take a blood and/or a urinalysis test. Employees who refuse to take these tests or who are found to be under the influence as a result of tests will be subject to disciplinary procedures which may result in dismissal from the Authority's service.

Thereafter, on October 27, 1985, SEPTA issued RRD Special Instruction 1001-A2 which provided that members of the railroad unions "may be required to provide a urine sample after certain accidents and incidents or at the time the company reasonably suspects [an employee is] under the influence of, or impaired by drugs while on duty."

of substance abuse is societal. It is inescapable that the undue use of drugs or alcohol by the operator of a motor vehicle can be hazardous and potentially injurious, if not life-threatening. Where mass transit is concerned, the risk can involve large numbers of people.

SEPTA's decision to embark on unscheduled — "surprise" — testing of its employees arose from management's belief that cause or suspicion testing was ineffective to reduce on-the-job impairment. Patterned on other programs, SEPTA Order No. 87-1, issued January 21, 1987, was designed to interrelate educational prevention; treatment and rehabilitation; and monitoring and deterrence. The third element is embodied in unscheduled random testing.[5] Order No. 87-2, promulgated February 3, 1987, provided that an employee returning to work after a 30-day absence was subject to body fluid testing for drugs or alcohol.

In opposition to the testing, plaintiffs filed these actions and immediately sought injunctive relief, asserting that 87-1 violates the Fourth Amendment prohibition against unreasonable searches and seizures. They also contend that testing of employees returning to work after a 30-day hiatus under 87-2 is not constitutionally justifiable and that the entire program, as proposed, abridges the employee's confidentiality rights, and is overly broad, punitive, and inappropriate.[6] The Rail Brotherhoods maintain that the issues raised by 87-1 and 87-2 constitute a "major dispute" under the Railway Labor Act. If so, the Act requires notice and exhaustion of negotiation and mediation procedures before a change in the labor contract can be effectuated. 45 U.S.C.A. §156. SEPTA has not given notice. Its view is that 87-1 and 87-2 are evolutionary outgrowths of 85-1 and are not

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5. On January 23, 1987 urine tests of 13 randomly selected employees proved negative. This was the only day on which 87-1 was implemented. Thereafter, SEPTA agreed to await the outcome of these actions.

6. Plaintiffs filed amended complaints challenging 87-2.

a radical alteration of past policies. The United Transportation Union, Local 1594, also claims that it is entitled to protective procedures under Section 1101.-701 of the Pennsylvania Public Employe Relations Act.

SEPTA was preliminarily enjoined from proceeding with 87-1 and 87-2 because the program, as evidenced, was excessively intrusive and did not carry out its objectives. A Fourth Amendment violation appeared, therefore, to be likely. Also, under the Railway Labor Act, an ultimate finding of a "major dispute" was predictable. Bench opinion, February 9, 1987.

II.

On July 27, 1987 after months of consultation with experts and union representatives, SEPTA proposed a revised program and filed a petition to vacate the preliminary injunction.[7] Extensive testimony was given by toxicologists, pharmacologists, physicians, psychologists and others in defense and in criticism of the proposal. Areas of debate were the accuracy of the testing procedures, the positive thresholds, the incidence of testing, including the categories of employees subject to testing, the inclusion of prescription medication, the definition of fitness for duty, the type and the function of the employee assistance program, the effect of passive inhalation, the role of SEPTA's medical department, and SEPTA's administration of 85-1 and 85-2 during the past two years.[8]

As set forth in the revised proposal, the purpose of the program is to enforce a fitness for duty standard.

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7. Thereafter, SEPTA continued to make revisions in response to concerns expressed by the unions and by the court.

8. With the parties' consent, a court-appointed independent expert—a psychiatrist with expertise in pharmacology—was retained. This expert reviewed the testing proposal and the testimony of the parties' experts and consulted with the parties and the court.

This standard is applied to a class known as "operating employees" and is defined as the absence from one's system of alcohol, drugs and drug metabolites above specified thresholds. About 4,400 SEPTA employees come within this classification.[9] Breath testing is to be used for alcohol detection and is to be administered under forensically acceptable conditions. A positive result requires two successive minimum levels of .04 percent. For drugs, the testing modality is urinalysis. The specimen is to be given inside a private, partitioned bathroom stall. There are detailed specifications to assure chain of custody, proper laboratory control, and scientific testing. After initial screening, a positive result is subject to a confirmation procedure by gas chromatography/mass spectrometry, which is considered to be the most accurate technology available. See *Williams v. Secretary of Navy,* 787 F.2d 552, 555 (Fed.Cir.1986).

In the educational, or preventative phase, of the program, SEPTA employees will be informed about the harmful effects of drug and alcohol abuse, the availability of treatment, and SEPTA's employee and enforcement policies. In July, 1987 SEPTA sent its employees the revised program. Regular mailings and educational presentations will be made. Random testing will not be begun until 90 days after the program goes into effect

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9. The following positions are specifically enumerated:
   1. Engineer, Bus Person, Surface Train Person, Subway-Elevated Trainperson.
   2. Conductors and Passenger Attendants
   3. Construction Equipment Operators
   4. Superintendents of Operations, Towerpersons, Train Dispatchers, and Power Dispatchers
   5. Signal Maintainers
   6. Power Distribution Maintainers
   7. Vehicle, Mechanical, Track and Structural Inspectors
   8. Welders
   9. Sworn SEPTA police officers
   10. Any employees authorized to carry a firearm on duty
   11. Instructors and supervisors of the foregoing.

and no earlier than 30 days after the proposed employee assistance program is operational.

The employee assistance program will utilize an outside provider as opposed to in-house services. Its purpose is to offer substance abuse treatment and rehabilitation. If the employee voluntarily self-refers having not had a positive test result, he can obtain a second period of treatment. While in treatment, employees are to receive unused sick pay. A post-treatment 90-day period of alternative job assignment will occur, and the employee will be subject to unannounced testing.[10] Upon two positive tests, the employee is dischargeable. An employee who tests positive on a random screening or on return to work has one opportunity for self-referral and must not test positive again. Such employee is also subject to unannounced follow up testing for 12 months and scheduled testing for two years thereafter. If treatment is refused, the employee will be discharged. Employment assistance information will be given to SEPTA's medical department, which is to maintain it as confidential. No disclosure will be made to law enforcement authorities, and availability within the medical department is to be limited to "need-to-know."

Return to work testing applies to "operating employees" who return to work after a 30-day absence. The reason for the absence is immaterial.[11]

The selection of employees to be randomly tested will be made pursuant to a protocol developed by a statistician and will be computerized. 2,600 of the 4,400 operating employees will be tested for drugs and alcohol

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10. The pay scale will be for the alternative assignment.

11. Testing of "operating employees" who are transferred within SEPTA was also mentioned at the hearings. In October, 1987, TWU filed a second amended complaint claiming damages for employees tested under the return to work provisions of 87-2 and challenging other body fluid testing that occurs without reasonable suspicion. It is agreed that the only issues to be adjudicated here concern random and return to work testing under 87-1 and 87-2.

each year — 33 percent once, 10 percent twice, and two percent more frequently. About 5,400 random breath alcohol tests will also be given. Using this statistical design, each operating employee will be at testing risk every day, although the chances of being tested more than twice a year will be small. The total cost of the program for the first two years will be $3 million and should diminish thereafter.

Operating employees taking prescription medication will be required to obtain approval from SEPTA's medical department before reporting to work. A fitness for duty determination will be made in consultation with the prescribing physician and a medical consultant. The prescription will be confidential information.

As finally revised, the program contemplates establishment of an advisory committee of labor representatives to review the program semi-annually and to consult with SEPTA management as to any important changes—such as enlargement of the class of operating employees, a change in the employee assistance provider or testing analysis laboratory.

The basic design of the program was formulated by a psychologist who is the director of Rutgers University Center of Alcohol Studies. He testified that he successfully developed similar programs for the United States Navy and professional sports. In his opinion, an effective program requires a balanced combination of education, treatment, deterrence and enforcement. The testing is aimed at detecting chronic abusers, not actual impairment. The reason is two-fold: On the one hand, actual impairment is hard to measure using present technology. On the other, if testing were pre-scheduled and announced in advance, many abusers would be able to stay drug-free during the testing period. A positive result establishes relatively recent intake in a pharmacologically active amount. Tr. Sept. 9, 1987, at 21. In his opinion, the testing must be at random, unannounced, and done daily in order to act as an effective deterrent.

Although problems remain[12] with the revised program, it is not so intrusive or unreasonable as to fail to withstand constitutional scrutiny. Given the experience in other settings, the program appears to be logically related to its purposes. After a suitable trial period, improvements can be made and deficiencies can be corrected. Plaintiffs are not foreclosed from instituting a specific challenge at a later date. *See American Federation of Government Employees, AFL-CIO v. Dole,* 670 F.Supp. 445, 449 (D.D.C.1987). By repeated revision of the original program, SEPTA has shown some willingness to accept recommendations and to accommodate other points of view.

With much force, the unions argue that the program is largely experimental; that a less intrusive program could be tried first; that the proposal is a substantial departure in policy that is unlikely to be accepted by SEPTA's already discontented employees; that the program would be much more effective if SEPTA were willing to share control of it with labor; and that rigid administration, as has occurred in the past, will produce arbitrary and unjust results. Making due allowance for that position, the reasons for permitting random testing to proceed are the evidence of a drug problem among SEPTA's employees and the now well recognized presence of substance abuse in our society; the public interest in having a mass transportation system operated as safely and efficiently as practicable; the knowledge of

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12. See Bench Remarks, September 25, 1987. Since then a number of criticisms were rectified, but, in my view, a much better program could have been proposed if SEPTA had abandoned its traditional approach to labor-management issues. The constitutionality of substance testing by a public employer must rest on the public's needs, not the employer's. The best chance of success with such a program is to have the cooperation of labor, which requires that management share—just as a matter of enlightened self-interest—some of its decision-making and administrative powers. This SEPTA has agreed to do only in small measure.

operating employees of the safety critical nature of their jobs; the employees' corresponding diminished expectation of privacy in the performance of their duties; the probable efficacy of the program; the various measures to minimize the intrusiveness of the searches; and SEPTA's testimonial pledge to implement the program fairly and sensitively.

III.

[1] Because it is a state agency and instrumentality, the Fourth Amendment applies to SEPTA, through the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Compulsory urinalysis and chemical breath testing have been held to be searches and seizures within the meaning of the Fourth Amendment. *E.g., National Federation of Federal Employees v. Weinberger,* 818 F.2d 935, 942 (D.C.Cir.1987) (citing cases). To comply constitutionally, searches must be reasonable. *New Jersey v. TLO,* 469 U.S. 325, 337, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985). Although a warrant and probable cause or some quantum of individualized suspicion bear on the reasonableness issue, the Fourth Amendment does not require an irreducible minimum of individualization. *United States v. Martinez-Fuerte,* 428 U.S. 543, 560–61, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976). Sometimes, the balancing of interests attenuates an individualized approach. *E.g., National Treasury Employees Union v. Von Raab,* 816 F.2d 170, 176-77 (5th Cir.1987).

The evidence demonstrates that SEPTA's suspicion-testing program has not been enough to satisfy the needs of public safety and mass transit reliability. In turn, employees in operational positions cannot reasonably expect SEPTA to ignore its responsibility to do all possible to ensure public confidence in its services. *Von Raab,* 816 F.2d at 180; *Shoemaker v. Handel,* 795 F.2d 1136, 1142 (3d Cir.), cert. denied, ____ U.S. ____, 107

S.Ct. 577, 93 L.Ed.2d 580 (1986). In these circumstances, the constitutionality of the program depends on a "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). *McDonell v. Hunter,* 809 F.2d 1302, 1305 (8th Cir.1987). *See O'Connor v. Ortega,* ____ U.S. ____, 107 S.Ct. 1492, 1501-03, 94 L.Ed.2d 714 (1987) (plurality opinion) (public employers have overriding administrative interest different from law enforcement so that intrusions on privacy of government employees in investigating work related misconduct should be assessed by reasonableness standard and totality of circumstances).

SEPTA's interests in the safety of its passengers and in the public's reposing confidence in its system are of paramount importance. *Division 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1267 (7th Cir.) *cert. denied,* 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976). "Government has a vital interest in making certain that its employees, particularly those whose impairment endangers their co-workers or the public, are free of drugs." *Capua v. City of Plainfield,* 643 F.Supp. 1507, 1511 (D.N.J.1986). It is perhaps stronger than New Jersey's interest in "assuring the public of the integrity of the persons engaged in the horse racing industry." *Shoemaker,* 795 F.2d at 1142 (that interest and jockey's reduced expectation of privacy held to justify program of random breath testing and urinalysis). As with all public employers, SEPTA is required by law to administer its work properly and efficiently. *O'Connor,* ____U.S. at ____, 107 S.Ct. at 1501-03.

The well known effects of alcohol and drug abuse, together with the two-year record of positive test results and accidents and injuries since 85–1, sufficiently show that public safety and public confidence problems exist in SEPTA's operations. Although the percentage of

employees who chronically abuse alcohol and drugs may not be large, SEPTA is obligated, legally, ethically and as a matter of good management, to take steps to reduce the problem to a minimum. *Jones v. McKenzie,* 833 F.2d 335, 340 (D.C.Cir.1987). Needless serious personal injuries and deaths caused by alcohol or drug related accidents are the unacceptable alternative. SEPTA must continually explore a variety of programs with its employees and its equipment to improve the safety of its operations. Moreover, SEPTA should be encouraged to take remedial measures and to design new personnel programs if reasonable and minimally intrusive. *See Von Raab,* 816 F.2d at 179 (not unreasonable to address a potential drug problem even in the absence of evidence of prior drug related accidents or individualized suspicion that a particular employee has a drug or alcohol problem). All of SEPTA's operating employees must be acutely aware that the public questions the system's safety and reliability, including the presence of alcohol and drug abuse.

Reliance on suspicion testing appears, therefore, to be inadequate. Many drugs have delayed, residual or chronic effects not ascertainable through behavioral observation. Tr. Feb. 5, 1987, at 311-316. Numerous SEPTA employees operate without close supervision. Even obvious impairment can go undetected. Recurrent notice testing will detect only those who cannot temporarily abstain. Considering our present knowledge and experience, a program of frequent random testing may be the best means of assuring that SEPTA employees will not be impaired and of gaining public acceptance and support. *Shoemaker,* 795 F.2d at 1142. It may be the only way to deal with the problem of substance abuse in a highly regulated and safety critical industry affected with the public interest. *McDonell,* 809 F.2d at 1308.

Drug screening by urinalysis is, concededly, a serious infringement of an individual's reasonable expectation of privacy.[13] As revised, the SEPTA program markedly reduces its intrusiveness. Union consultation is contemplated. Alcohol testing, conducted by breathalyzer, is less intrusive than urinalysis or blood testing. Urinalysis, properly administered, is not as intrusive as a strip search or a blood test. *McDonell,* 809 F.2d at 1308; *Von Raab,* 816 F.2d at 177. Advance notice reduces the intrusive nature of a search. *Weinberger,* 818 F.2d at 943; *Shoemaker,* 795 F.2d at 1142; *Capua,* 643 F.Supp. at 1515 (surprise early morning urinalysis of city fire fighters unconstitutional).[14]

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13. "One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds." *McDonell v. Hunter,* 612 F.Supp. 1122, 1127 (S.D.Iowa 1985), *aff'd as modified,* 809 F.2d 1302 (8th Cir. 1987). Urine testing may disclose whether the employee is under treatment for an illness and the presence of nonprescription substances such as blood. "There are few activities in our society more personal or private than the passing of urine." *Von Raab,* 816 F.2d at 175.

14. A growing number of decisions have concluded that nonsuspicion mandatory urinalysis by a public employer is unconstitutional. *See, e.g., Policemen's Benevolent Assoc., Local 318 v. Township of Washington,* 672 F.Supp. 779 (D.N.J. 1987) (police officers); *Taylor v. O'Grady,* 669 F.Supp. 1422 (N.D.Ill. 1987) (correctional employees); *Feliciano v. City of Cleveland,* 661 F.Supp. 578 (N.D.Ohio 1987) (police academy candidates); *American Federation of Government Employees v. Weinberger,* 651 F.Supp. 726 (S.D.Ga. 1986) (civilian police employed by Department of Defense); *Lovvorn v. City of Chattanooga,* 647 F.Supp. 875 (E.D.Tenn. 1986) (firefighters); *Caruso v. Ward,* 133 Misc.2d 544, 506 N.Y.S.2d 789 (Sup.Ct. 1986), *aff'd,* 131 A.D.2d 214, 520 N.Y.S.2d 551 (App.Div. 1987) (members of organized crime control bureau); *Patchogue-Medford Congress of Teachers v. Board of Education,* 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986), *aff'd,* 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (public school teachers). Many of these cases distinguish *Shoemaker* and other nonsuspicion testing decisions based on insufficient showing of need, or of reduced expectations of privacy, or

As noted, collection personnel do not observe the employee during urination, which takes place in a private restroom stall. *See Mullholland v. Department of Army,* 660 F.Supp. 1565, 1569 & 1576 (E.D.Va. 1987). A high degree of confidentiality is to be maintained. "The need for protection against governmental intrusion diminishes if the investigation is neither designed nor likely to be used to bring criminal charges against the person investigated." *Von Raab,* 816 F.2d at 179. *See O'Connor,* ____ U.S. at ____, 107 S.Ct. at 1501; *Shoemaker,* 795 F.2d at 1140 (test results kept confidential from enforcement agencies). There are provisions allowing an employee whose test is positive to challenge the result. *See Banks v. Federal Aviation Admin.,* 687 F.2d 92, 95 (5th Cir.1982). The detailed chain of custody provisions virtually eliminate the possibility that a sample will be incorrectly identified. *Rushton v. Nebraska Public Power Dist.,* 653 F.Supp. 1510, 1526 (D.Neb. 1987).

The program contains a strong rehabilitative component, and an ameliorative distinction is made between a voluntary self-referral and an employee whose unfitness is raised by a test result. Though the incidence of testing may be unduly large, the protocol was intended to maximize its deterrent value, an essential part of the integrated program. Tr. Feb. 5, 1987, at 284. *Von Raab,* 816 F.2d at 180. With time, its volume can be reduced. Moreover, the plan approved by this Circuit, in *Shoemaker,* authorized the testing of the same jockey three times in one week. *Shoemaker,* 795 F.2d at 1140. Here, by comparison, only two percent of the operating employees will be tested more than twice a year.

NOTES *(Continued)*

because of a high degree of intrusiveness. None involves a work environment as demonstrably safety sensitive as SEPTA's, compelling evidence of a current drug and alcohol problem unlikely to be solved by less aggressive measures, and a program as carefully drawn as SEPTA's.

The random screening protocol assures that selection for testing is at random and eliminates any exercise of discretion by SEPTA management. Specific and definite standards for determining a positive test result are set forth, and the testing is to be conducted by an accredited independent laboratory. Specific procedures for sample collection are included in the program. These safeguards are sufficient to protect the employees' reasonable expectations of privacy from the exercise of discretion by SEPTA management in deciding of whom, when and in what manner to conduct the search. *Delaware v. Prouse,* 440 U.S. 648, 655 & 663, 99 S.Ct. 1391, 1396-97 & 1401, 59 L.Ed.2d 660 (1979); *Von Raab,* 816 F.2d at 177; *Shoemaker,* 795 F.2d at 1143.

[2] However, the considerations that justify random testing in an integrated program do not pertain to return to work testing. That aspect of SEPTA's proposal is unwarranted constitutionally absent some reasonable suspicion or programmatic basis. With random testing in place, the need for return to work testing would substantially be eliminated. Employees who return to work will immediately be subject to daily random testing. The physical examination conducted upon return to work should be sufficient to identify employees clearly not fit for duty. SEPTA has not met its burden of justifying return to work as an occasion for testing. *Weinberger,* 818 F.2d at 943 (citing *TLO,* 469 U.S. at 341-42, 105 S.Ct. at 743-44.) The indiscriminate scope of this policy includes those who have been ill, on leave of absence – or any employee who has not been at work for 30 days. There was no evidence suggesting that return to work testing was an integral part of the revised program.

IV.

[3] The collective bargaining relationships that exist between SEPTA and the railroad unions are governed

by the Railway Labor Act. 45 U.S.C.A. § 151 *et seq.* "In general, if a proposed practice by a rail carrier is a clear departure from the collective-bargaining agreement, a dispute over the practice is treated as a major dispute under the Railway Labor Act, and the carrier may not proceed without first negotiating with the employee's representative." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1017 (8th Cir. 1986).

Under the collective bargaining agreements in effect when SEPTA issued 87-1,[15] an employee's use or possession of drugs and alcohol on the job was prohibited. Those suspected of drug use were subject to urine testing. *See supra* note 4 (Rule I and Rule 100I-A2). Under 85-1, off-duty employees who were subject to duty and suspected of being under the influence could be tested. *See supra* page 545. In addition, body fluid testing occurred upon signal rule violations and upon employee transfers or promotions to safety important jobs. Random testing did not take place. There is no evidence that the unions agreed to or acquiesced in widespread testing or to any significant testing without individualized suspicion.

The unions' acquiescence in suspicion-based, post-violation, transfer and promotion testing cannot be interpreted as an authorization or even foreshadowing of 87-1. *Brotherhood of Maintenance of Way Employees, Lodge 16,* 802 F.2d at 1023. Only "long standing practices" can be considered part of a collective bargaining agreement in determining whether a proposed change is "arguably justified" by the parties' agreement. *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

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15. Return to work testing would also appear to be covered by the "major dispute" rule, but this issue is not dealt with in view of the determination that such testing is constitutionally impermissible.

SEPTA proposes to test 45 percent of its operating employees at least once each year. The incidence, focus, rationale for, and employee impact of such testing is substantially different from 85-1, and it obviously will affect the working relationship of the parties. The proposal cannot be "arguably justified" by the terms of prior agreements or the parties' prior practice. The unions are correct that the proposed program constitutes a "major dispute," precipitating the notice and administrative requirements of 45 U.S.C.A. § 156. *Brotherhood of Locomotive Eng'rs. v. Burlington Northern R.R.*, 620 F.Supp. 163, 170-172 (D.Mont. 1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986). *See Railway Labor Executives v. Norfolk & Western Ry.*, 833 F.2d 700, 707 n. 6 (7th Cir. 1987). The status quo rule of Section 156, which is the centerpiece of the Act, is intended to encourage resolution through mediation and, if necessary, arbitration. *Detroit & Toledo Shoreline R.R. v. United Transp. Union*, 396 U.S. 12, 148-51, 90 S.Ct. 294, 298-99, 24 L.Ed.2d 325 (1969). *See Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1021.

The railway unions, for these reasons, are entitled to an injunction preserving the status quo.

V.

[4] Local 1594 of the UTU represents the bus and trolley operators of SEPTA's Red Arrow division under the Pennsylvania Public Employe Relations Act, 43 P.S. § 1101 *et seq.* Under 43 P.S. § 1101.701, public employers must bargain in good faith with the representative of their employees over wages, hours and other terms and conditions of employment. Local 1594 requests an injunction requiring SEPTA to fulfill that statutory duty before implementing the program. However, a failure to bargain in good faith is an unfair labor practice under 43 P.S. § 1101.1201. Under 43 P.S. § 1101.1301, exclusive

jurisdiction to prevent unfair labor practices is given to the Pennsylvania Labor Relations Board. *See Philadelphia Federation of Teachers v. Board of Education,* 24 Pa.D. & C.3d 211, 214-15 (1981). Federal courts lack subject matter jurisdiction over unfair labor practice claims that come within the board's jurisdictional purview. *Sellers v. Local 1598, Dist. Council 88, AFSCME,* 600 F.Supp. 1205, 1212-13 (E.D.Pa. 1984), *aff'd,* 810 F.2d 1164 (3d Cir. 1987). Local 1594's request for injunctive relief must be denied for lack of jurisdiction.

An order follows.

ORDER

AND NOW, this 19th day of January, 1988 it is ordered:

1. The preliminary injunction entered February 9, 1987 is dissolved.

2. The request of plaintiffs Transport Workers' Union of Philadelphia, Local 234 and Transport Workers' Union of America, Local 2013 for a permanent injunction of SEPTA order no. 87-1, as revised, is denied, subject to the following:

   a. "Operating Employees" shall not include "Conductors and Passenger Attendants" unless it is established that these are safety sensitive positions.

   b. SEPTA order no. 87-1, as finally revised, shall be submitted to this court for review before it is promulgated, and random testing shall not be begun until after court review occurs.

   c. This court shall retain jurisdiction to supervise the implementation of 87-1.

3. The request of all plaintiffs for a permanent injunction of SEPTA order no. 87-2 is granted.

4. The request of the Railroad Brotherhood plaintiffs for a permanent injunction of SEPTA order no. 87-1, as finally revised, is granted until such time as SEPTA complies with Section 156 of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

5. The request of the plaintiff Local 1594 of the United Transportation Union for a permanent injunction of SEPTA orders nos. 87-1 and 87-2 because of SEPTA's alleged noncompliance with the Pennsylvania Public Employe Relations Act is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0389
TRANSPORT WORKERS' UNION OF AMERICA LOCAL 2013	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0446
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71, et al	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al	:	NO. 87-0448
UNITED TRANSPORTATION UNION, et al	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0455

ORDER

AND NOW, this 19th day of February, 1988, it is hereby ordered and decreed that Southeastern Pennsylvania Transportation Authority ("SEPTA") may promulgate its Integrated Program of Education, Assistance, and Testing for Intoxicants and Controlled Substances – As Revised (and as further modified and submitted to the Court for review on January 28, 1988) ("Integrated Program"). It is hereby further ordered and decreed that SEPTA may begin random testing under the Integrated Program upon accomplishing the following steps:

1. Notification of all affected employees of the existence of the Integrated Program.

2. Constituting the Advisory Committee.

3. Meeting with the Advisory Committee concerning the selection of the Employe Assistance Program Referral Agency and Providers.

4. Implementation of the Revised Employe Assistance Program (which implementation shall precede the implementation of random testing by at least 10 days).

SEPTA shall notify plaintiffs at the time of accomplishing each of these steps.

/s/ E. LUDWIG

Edmund V. Ludwig, *J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0389
TRANSPORT WORKERS' UNION OF AMERICA LOCAL 2013	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0446
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71, et al	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0448
UNITED TRANSPORTATION UNION, et al.	:	CIVIL ACTION
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	NO. 87-0455

ORDER

AND NOW, this ____day of February, 1988, it is hereby ordered and decreed that the Motion of Southeastern Pennsylvania Transportation Authority To Alter Or Amend Judgment And To Amend Findings Of Fact is hereby granted. Paragraph 3 of the Order entered by the Court on January 20, 1988 is hereby deleted, for the reasons set forth in the revised Memorandum issued this date.

BY THE COURT:

/s/ Denied – E. LUDWIG

J.

Entered: 3-1-88
ORDER OF COURT

No. 88-1653

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNITED TRANSPORTATION UNION,
Cross-Petitioner

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,
Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

QUESTION PRESENTED

Whether the addition by an urban mass transportation authority of random drug and alcohol testing for safety-sensitive personnel to its existing fitness for duty testing program violates the Fourth Amendment where there is an established drug abuse problem among its employees and a compelling need to ensure the safety of the commuting public.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The proceedings below involved four actions which were not consolidated into one action. The parties to the proceedings below with their respective docket numbers are as follows:

The Cross-Petitioner is the United Transportation Union. The Cross-Petitioner was one of the Plaintiffs-Appellants-Cross-Appellees in Nos. 88-1163 and 88-1208.

The Cross-Respondents are Southeastern Pennsylvania Transportation Authority, Louis F. Gould, Jr., Esquire, Individually and in his official capacity as Chairman of the Board of SEPTA; Robert J. Thompson, Individually and in his official capacity as Vice Chairman of the Board of SEPTA; Brian W. Clymer; Judith E. Harris, Esquire; Mary C. Harris, Thomas M. Hayward, C.P.A.; Frank W. Jenkins, Esquire; Richard E. Kutz, Esquire; David W. Marston, Esquire; James C. McHugh and Franklin C. Wood, Individually and in their official capacities as Members of the Board of SEPTA. The Cross-Respondents were Defendants-Appellees-Cross-Appellants in all of the cases: Nos. 88-1160, 88-1161, 88-1162, 88-1163, 88-1206, 88-1207 and 88-1208.

Other parties to the proceedings below are:

1. Transport Workers' Union of Philadelphia, Local 234 in Nos. 88-1160 and 88-1206;

2. Transport Workers' Union of America, Local 2013 in No. 88-1161;

3. Brotherhood of Locomotive Engineers, Division 71 and Brotherhood of Locomotive Engineers and Thomas C. Brennan in Nos. 88-1162 and 88-1207; and

4. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Brotherhood of Maintenance of Way

Employees, Brotherhood of Railroad Signalmen in Nos. 88-1163 and 88-1208.

Cross-Respondent Southeastern Pennsylvania Transportation Authority has no parent corporation(s), non-wholly-owned subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
CROSS-RESPONDENTS' BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. THE DECISION OF THE THIRD CIRCUIT IS CONSISTENT WITH THE HOLDINGS OF THIS COURT	3
II. THERE IS NO CONFLICT IN THE CIRCUITS	10
A. The UTU Misrepresents The Current Status Of The Law Since The Sixth Circuit Vacated Its Decisions In *Lovvorn* and *Penny*	10
B. The Only Other Circuit Courts To Address The Issue Of Random Drug And Alcohol Testing Have Upheld Such Testing	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Delaware v. Prouse, 440 U.S. 648 (1979)..... 9-10

Div. 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976) 12

Donovan v. Dewey, 452 U.S. 594 (1981) 9

Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir.), *vacated* and *reh'g. en banc granted,* 861 F.2d 1388 (6th Cir. 1988) 10, 11

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)... 9

McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) 12

National Treasury Employees Union, et al. v. Von Raab, 109 S.Ct. 1384 (1989) 3, 4, 5, 7, 8, 9

Penny v. Kennedy, 846 F.2d 1563 (6th Cir.), *vacated* and *reh'g en banc granted,* 862 F.2d 567 (6th Cir. 1988)..... 10, 11

Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington, 850 F.2d 133 (3d Cir. 1988), *cert. denied,* 109 S.Ct. 1637 (1989) 12

Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir. 1988)..... 12

Schaill v. Tippecanoe County Corporation, 864 F.2d 1309 (7th Cir. 1988)..... 12

Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986)..... 12

Skinner v. Railway Labor Executives' Association, 109 S.Ct. 1402 (1989)..... 3, 4, 5, 6, 7, 8, 9, 10

Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986)... 12

TABLE OF AUTHORITIES – *(Continued)*

Statutes: Page

Railway Labor Act 2

Miscellaneous:

Rule 34.2, Supreme Court Rules 2

No. 88-1653

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNITED TRANSPORTATION UNION,
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v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,
Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

Cross-Respondents, Southeastern Pennsylvania Transportation Authority, et al. (SEPTA) respectfully request that this Court deny the cross-petition for a writ of certiorari seeking review of the Third Circuit's opinion in this case on the issue of random drug and alcohol testing. That opinion is reported at 863 F.2d 1110 (3d Cir. 1988) and is reproduced in the Appendix to the Cross-Petition (C-P) at A-1 to A-30.

STATEMENT OF THE CASE

The UTU has filed a Cross-Petition for a Writ of Certiorari on the question of the constitutionality of SEPTA's random drug and alcohol testing of operators and other safety-sensitive personnel. The case arises out of SEPTA's efforts to apply a long-standing and well publicized fitness for duty standard, and in support thereof to conduct random and return-to-work drug and alcohol testing of such personnel all as part of a balanced, tripartite program of education, rehabilitation and testing.

The UTU filed its Cross-Petition in response to SEPTA's Petition for a Writ of Certiorari filed on March 8, 1989 and docketed by this Court as No. 88-1486 (the Petition). The Petition addresses the major/minor dispute status under the Railway Labor Act of SEPTA's addition of random drug and alcohol testing to its existing fitness for duty drug and alcohol testing on its Regional Rail Division.[1] The Statement of the Case therein encompasses the facts pertinent to the Constitutional question as well, and, with the exception of Section G, is incorporated by reference herein.[2]

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1. On March 28, 1989, SEPTA filed a Motion to Withdraw In Part Petition for a Writ of Certiorari requesting the withdrawal of a second question regarding return-to-work testing which SEPTA presented in its Petition.

2. In addition, however, certain assertions contained in the UTU's statement of the case require correction. Rule 34.2, Supreme Court Rules. After noting that "[t]he trial court ordered SEPTA to prepare a revised program", C-P at 5, the UTU states that SEPTA's testing program was one that "continued to be revised, however, up to, during and after trial". C-P at 5. The UTU characterizes the revision process in a perjorative manner. Rather, that process was viewed by the District Court as a positive one: "*By repeated revision* of the original program, SEPTA has shown some willingness to accept recommendations and to accommodate other points of view." C-P at A-42 to A-43 (emphasis added).

The UTU also suggests that television reporters observed and television cameras recorded the act of urination by eleven SEPTA

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT IS CONSISTENT WITH THE HOLDINGS OF THIS COURT.

The Supreme Court decisions against which the Third Circuit's decision in this case must be measured are those in *Skinner v. Railway Labor Executives' Association,* 109 S.Ct. 1402 (1989) and *National Treasury Employees Union, et al v. Von Raab,* 109 S. Ct. 1384 (1989). The Third Circuit's decision in this case is in no way inconsistent with either of those subsequent decisions.

The essence of *Skinner* is that (1) the expectations of privacy of railway employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, which depends "in substantial part on the health and fitness of the . . . employees", 109 S.Ct. at 1418; (2) the governmental interest in testing employees who discharge "duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" is compelling, 109 S.Ct. at 1419; and (3) the Federal Railroad Administration "regulations supply an effective means of deterring employees engaged in safety sensitive tasks from using controlled substances or alcohol, in the first place" [*i.e.* before serious accidents occur]. 109 S.Ct. at 1419. Therefore, consistent with long standing principle, the Court reiterated in *Skinner* that a search warrant is not essential to render a particular search reasonable under the Fourth Amendment, and further, that in limited circumstances such as *Skinner* and *Von Raab*, where the privacy interests implicated by the

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employees on January 23, 1987 (prior to the District Court's injunction) at the outset of the then totally unrevised testing program. C-P at 4-5. There is not a shred of evidence in the record to support that suggestion which is simply untrue.

search are minimal and where an important governmental interest would be placed in jeopardy by a requirement of individualized suspicion, the search may be reasonable despite the absence of such suspicion. 109 S.Ct. at 1414-1421; 109 S.Ct. at 1390-1396. The Third Circuit's determination that random drug and alcohol testing of SEPTA's operators and other safety-sensitive employees is Constitutionally permissible squares precisely in all aspects with those elements of *Skinner*, and with *Von Raab,* which relied upon the reasoning of *Skinner.*

In *Skinner,* this Court upheld post-accident drug testing in the railroad industry where "[t]he problem of alcohol use . . . is as old as the industry itself", 109 S.Ct. at 1407; in *Von Raab*, it upheld suspicionless testing of Customs Service employees seeking promotion to jobs directly related to the interdiction of drugs or positions which require the carrying of firearms, even though the Service was "largely drug free", 109 S.Ct. at 1387. In each case, this Court took notice that drug abuse is widespread and poses a sufficient threat to the public safety or the nation's security so as to justify warrantless searches without individualized suspicion. *Skinner,* 109 S.Ct. at 1407, 1414-1416 and *Von Raab,* 109 S.Ct. at 1390-1393. In both *Skinner,* where the purpose is to "prevent accidents and casualties in railroad operations" and "ensur[e] the safety of the travelling public and of the employees themselves", 109 S.Ct. at 1415, and *Von Raab,* where the Customs Service's purpose is to ensure "safety and . . . the integrity of our borders," 109 S.Ct. at 1394, and " 'the operational realities of the workplace' may render entirely reasonable certain work-related intrusions", 109 S.Ct. at 1393, this Court found that the compelling governmental interests outweighed the individual employees' diminished expectation of privacy. 109 S.Ct. at 1418 and 109 S.Ct. at 1394.

Likewise, the Third Circuit established that SEPTA had "important public safety considerations in mind".

C-P at A-23.[3] The Third Circuit further noted:

> The safety justification for SEPTA's drug testing policy, SEPTA's documentation of drug use problem among its work force, the evidence of the deleterious effect of drug use, and SEPTA's showing of positive tests for drugs and alcohol by operating personnel at fault in accidents are sufficient bases for us to conclude that the random testing policy is constitutionally justified at its inception.

C-P at A-23. After establishing that there were these important public safety considerations at stake, the Third Circuit concluded that SEPTA's random testing

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3. The Third Circuit summarized the findings of the District Court as follows:

> The District Court made findings that drug use by SEPTA's operating employees presents a significant safety problem and that the Authority's prior suspicion-based testing program proved insufficient 'to satisfy the needs of the public safety' . . . There is adequate support for the district court's findings. SEPTA established that in six major accidents occurring in 1986 and 1987, collectively involving at least 89 injuries to persons, the operators of vehicles at fault tested positive for alcohol or drug metabolites. App. at 1017. The operator at fault in another accident refused to submit to a test. Further, of 262 employees tested "for cause" between January 1985 and July 1987, 82 employees (thirty-one percent) tested positive for drug metabolites or alcohol. App. at 1166. Twelve percent of the "new hires" given drug tests within the same period produced positive results (116 of 1,004 tested). App. at 1165. The Unions do not argue that these are statistically insignificant figures.

C-P at A-19 to A-20.

The statistical evidence documenting drug abuse and its relation to major accidents at SEPTA which was presented to the courts below, is of a greater magnitude than the evidence associated with the alcohol problem in *Skinner,* when one considers that the statistics in *Skinner* represented the entire railroad industry for periods of eight and eleven years. See *Skinner,* 109 S.Ct. at 1407-1408 and n. 1 and *Von Raab,* 109 S.Ct. at 1400 (Scalia, J. dissenting). The evidence in this case is also representative of a more recent time period than that described in *Skinner.*

program was constitutionally valid because there were sufficient safeguards such as confidentiality, chain of custody, verification, and scientific random selection procedures, to protect against abuse of official discretion in deciding whom and how to search; the testing policy was limited to employees whose job performance implicated public safety; and, finally, that there was a sufficient nexus between SEPTA's rationale for testing and the information gleaned through the use of urine tests. C-P at A-23 to A-24.

This Court in *Skinner* also concluded that the need for testing of safety-sensitive railway employees is compounded by the difficulty of detecting impairment:

> An idle locomotive, sitting in the roundhouse is harmless. It becomes lethal when operated negligently by persons under the influence of alcohol or drugs.' 839 F.2d at 593. . . .
>
> By contrast, the government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, see, e.g., *Rushton v. Nebraska Public Power District,* 844 F.2d 562, 566 (C.A. 8 1988); *Alverado Washington Public Power Supply System,* 111 Wash. 2d at 436, 759 P.2d at 433-434, employees who were subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee, the agency found, will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.' 50 Fed. Reg. 31526 (1985).

> This view finds ample support in the railroad industry's experience with Rule G and, in the judgment of the courts that have examined analogous testing schemes.

109 S.Ct. at 1419.

> Similarly, the Third Circuit observed:
>
> . . . users are frequently able to mask their impairment so that it is not apparent. App. at 347. Also, SEPTA produced testimony establishing that use of drugs in itself results in significant impairment. There was testimony that long after all traces of drugs have left the system, there are significant delayed and chronic impairment effects.
>
> . . . In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then-current impairment could be detected, particularly in light of the testimony by experts offered by both the Unions and SEPTA that current urine testing technologies do not permit the detection or measurement of current impairment. *See* App. at 540, 548, 747, 780, 354-55.

C-P at A-20 to A-21.

The parallel between the concerns and reasoning of this Court in *Skinner* and *Von Raab* and the Third Circuit in this case emphasizes the consistency between the holdings of this Court and the Third Circuit decision.

The fact that neither *Skinner* nor *Von Raab* directly addressed random drug and alcohol testing does not render the Third Circuit's decision inconsistent with these opinions. For example, in *Skinner,* this Court was as concerned with the government's legitimate purpose in deterring drug and alcohol use through post-accident

testing as it was in determining which members of a train crew might have breached the regulations prohibiting drug use while in control of the railroad's equipment. 109 S.Ct. at 1419-1420. This Court noted:

> By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the time of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct . . . concomitantly increasing the likelihood that employees will forego using drugs or alcohol while subject to being called for duty.

109 S.Ct. at 1420. Similarly, under random testing, SEPTA's employees in operator and other safety-sensitive positions know they will be tested upon the occurrence of a computer generated, scientifically random selection of their name, the timing of which no SEPTA employee can predict with certainty. Thus, like the railway employees in *Skinner,* random testing will significantly increase the deterrent effect of the consequences associated with such prohibited conduct and will increase the likelihood that SEPTA's employees will forego using drugs or alcohol while on or subject to being called for duty. To that extent, as well, the Third Circuit decision is completely consistent with *Skinner* and *Von Raab.*

Moreover, notwithstanding the UTU's attempt to create the image of an Orwellian drama in which employees subject to random testing would be required to appear "at any time of the day or night and on or off duty (i.e. subject to call)", C-P at 13, and "[t]he employee, while subject to duty, may be called at home in the middle of the night and ordered to report for a blood and urine test", C-P at 12, the Court held in *Skinner*, that the railroad's interest in "ensuring the safety of the travelling public and of the employees themselves

plainly justifie[d] prohibiting covered employees from using alcohol or drugs on duty, *or while subject to being called for duty."* 109 S.Ct. at 1415 (emphasis added). Thus, the testing of employees subject to duty is not inconsistent with *Skinner*.

The UTU relies principally upon two cases long predating *Skinner* and *Von Raab* to support its contention that the Third Circuit decision conflicts with holdings of this Court. Both are readily distinguishable. *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978) involved the inspection of an ordinary business and thus fell well outside the "recognized exception" to the warrant and probable-cause requirement when "special needs" make that requirement "impracticable." 109 S.Ct. at 1414. There was in *Barlow's* no need comparable to "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety." *Id.* The Court distinguished *Barlow's* from cases involving businesses which "are indeed exceptions" to the search warrant requirement, such as those selling liquor and firearms. 436 U.S. at 313. See also *Donovan v. Dewey,* 452 U.S. 594, 601-602 (1981) (distinguishing *Barlow's* and noting its intended limitations.)

Similarly, there is no "direct conflict with this Court's decision in *Delaware v. Prouse,* 440 U.S. 648 (1979)". C-P at 12. As noted by this Court in *Skinner,* 109 S.Ct. at 1414, what is reasonable under the Fourth Amendment "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself". "Thus", this Court continued, quoting *Delaware v. Prouse,* 440 U.S. at 654, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " 109 S.Ct. at 1414. In *Prouse,* this Court held that the random check of automobile drivers was not "a sufficiently productive mechanism to justify the intrusion". 440 U.S. at 659. The Court found in

Prouse that alternative mechanisms were available, *Id.*, unlike the situation in this case, where the Third Circuit concluded that:

> In light of the district court's finding that "[m]any drugs have delayed, residual or chronic effects not ascertainable through behavioral observation," 678 F.Supp. at 550, and that SEPTA's operating employees often work in circumstances which preclude close supervision, making it infeasible to monitor performance or detect signs of drug-induced impairment by direct observation, *the Unions have not shown that there is any less intrusive but equally effective means of detecting employee drug use.*

C-P at A-22 (emphasis added). Similarly, this Court in *Skinner* noted that the Federal Railroad Administration established the subject regulations because the prior industry efforts were not adequate to curb alcohol and drug abuse by railroad employees. 109 S.Ct. at 1407, 1419 n. 9.

In sum, the Third Circuit decision is entirely consistent with the holdings of this Court.

II. THERE IS NO CONFLICT IN THE CIRCUITS.

A. The UTU Misrepresents The Current Status Of The Law Since The Sixth Circuit Vacated Its Decisions In *Lovvorn* and *Penny*.

Contrary to the UTU's argument that this case presents the Court with "an appropriate vehicle to resolve the conflict between the circuits as to the constitutionality of random drug and alcohol testing," C-P at 14, there is no conflict between the circuits. Relying on two opinions, *Lovvorn v. City of Chattanooga,* 846 F.2d 1539 (6th Cir. 1988) and *Penny v. Kennedy,* 846 F.2d 1563 (6th Cir. 1988), the UTU claims that the Sixth Circuit has held that "mandatory urinalysis violates the

interests of public employees when it is carried out in the absence of reasonable individualized suspicion." C-P at 14 to 15.

On May 23, 1988, the Sixth Circuit did decide both *Lovvorn* and *Penny* holding that the mandatory urinalysis of firefighters and police officers on a department-wide basis without probable cause or suspicion was an unreasonable search and in violation of the Fourth Amendment. However, on August 3, 1988, the Sixth Circuit granted the appellants', City of Chattanooga and the Commissioner of Fire and Police of Chattanooga, petition for rehearing *en banc.* The Sixth Circuit ordered the previous decisions vacated, the mandates stayed and the cases restored to the docket as pending appeals. See *Lovvorn,* 861 F.2d 1388 (6th Cir. 1988) and *Penny,* 862 F.2d 567 (6th Cir. 1988). Additionally, the Sixth Circuit directed the parties to file supplemental briefs and noted that the clerk would schedule the cases for oral argument. The Sixth Circuit, sitting *en banc,* heard oral argument in both *Lovvorn* and *Penny* on December 7, 1988. To date, no decision has been rendered.[4] Thus, there is no conflict between or among the circuits.

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4. Even if the Sixth Circuit should decide that the drug testing programs in *Lovvorn* and *Penny* violate the Fourth Amendment, the UTU's argument that these decisions create a conflict between the circuits would be unconvincing. *Lovvorn* and *Penny* present cases that are distinguishable on the facts from the present one in that there was no evidence of drug use among the city firefighters or police officers. *Lovvorn,* 846 F.2d at 1547-1548 and *Penny,* 846 F.2d at 1567. This factual distinction was recognized by the Third Circuit in this case. See C-P at A-19 to A-20.

B. The Only Other Circuit Courts To Address The Issue Of Random Drug And Alcohol Testing Have Upheld Such Testing.

Although the UTU acknowledges that in addition to this case, the Third Circuit has upheld random drug testing in both *Shoemaker v. Handel,* 795 F.2d 1136 (3d Cir. 1986), *cert. denied,* 479 U.S. 986 (1986) and *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington,* 850 F.2d 133 (3d Cir. 1988), *cert. denied,* 109 S.Ct. 1637 (1989) and that the Eighth Circuit has approved random testing of prison guards in *McDonell v. Hunter,* 809 F.2d 1302 (8th Cir. 1987), it ignores two other cases in which the Eighth Circuit also held that random testing was constitutional. See *Rushton v. Nebraska Public Power District,* 844 F.2d 562 (8th Cir. 1988) (random testing of nuclear power plant employees upheld) and *Spence v. Farrier,* 807 F.2d 753 (8th Cir. 1986) (random urinalysis testing of inmates to detect and deter the use of contraband drugs upheld).

The UTU also cites a Seventh Circuit case, *Div. 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976), characterizing it as "the first case" to consider the application of the Fourth Amendment to body fluid drug and alcohol testing of public transportation employees." C-P at 15. Although the UTU does not offer this case as one creating a conflict between the circuits, nevertheless, it cites it as if it has special legal significance. But the Seventh Circuit itself in its most recent opinion addressing and upholding random urinalysis testing of interscholastic athletes and cheerleaders makes no reference to *Suscy.* See *Schaill v. Tippecanoe County Corporation,* 864 F.2d 1309 (7th Cir. 1988).

In sum, the Third, Seventh and Eighth Circuits have found random testing to be valid under the Fourth Amendment while no circuit court has found it invalid. Therefore, no conflict exists.

CONCLUSION

For each of the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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